Office - Supreme Court, U. S.
FILED
OCT 22 1941
CHARLES ELMORE CROPLEY
CLERK

(3)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

314-6

No. 712

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

SIGMUND M. BASS,
100 North Broadway,
St. Louis, Missouri,
BRYAN PURTEET,
705 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioners.

Of Counsel:
WARREN E. MILLER,
Washington, D. C.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

SUBJECT INDEX.

	Page
PETITION FOR WRIT OF CERTIORARI	1–13
Summary	2
The Statute Involved	2
Statement	4
Jurisdiction	9
The Questions Presented	9
Reasons for Granting Application for Writ	11
BRIEF IN SUPPORT OF PETITION	15
Opinion Below	15
Jurisdiction	15
Statement of the Case	16
Specifications of Error	16
ARGUMENT	17
I. The Circuit Court erred in holding the Indictment sufficient at law	17
History and interpretation of Act	17
II. The Anti-Racketeering Act Is Unconstitutional	20
Denies Defendants' Freedom of Speech	20
Violates the Tenth Amendment	21
Fifth Amendment	22
III. The Court erred by holding that witnesses could testify to hearsay statements, conclusions and third party conversations out of presence of defendants	23
IV. The verdict of the jury is unsupported by any competent evidence	28
V. The Court erred by refusing to consider petitioners' requested instructions	35
VI. The Court's charge was unfair, prejudicial and misstated the law	36
VII. The verdict of the jury is inconsistent	44
Conclusion	45

Table of Cases Cited.

Apex Hosiery Co. v. Leader, 310 U. S. 88..13, 21, 30, 36, 37
Bass v. United States, 20 App. D. C. 232..... 27
Beaux Arts v. United States, 9 F. (2nd) 531..... 20
Brabright v. United States, 105 F. (2nd) 202..... 39
Cox v. United States, 96 F. (2nd) 41..... 40
Dunn v. United States, 284 U. S. 390..... 44
Gargotta v. United States, 77 F. (2nd) 977..... 40
Gold v. United States, 102 F. 350..... 35
In re Snow, 120 U. S. 274..... 20
Levering & Garriques v. Morin, 289 U. S. 103..... 21
Masonic Home of Missouri v. Windsor, 92 S. W. (2nd) 713, 338 Mo. 877..... 27
McLaughlin v. United States, 26 F. (2nd) 1..... 23
Mima Queen v. Hepburn, 7 Cranch. 289, 3 L. Ed. 348.. 25
Nicola v. United States, 72 F. (2nd) 780..... 37
Schechter v. U. S., 295 U. S. 495..... 22
Senn's Case, 301 U. S. 478..... 20
Speiller v. United States, 21 F. (2nd) 682..... 44
Standard Oil v. United States, 221 U. S. 1..... 21
State v. Woodward, 90 S. W. 90, 191 Mo. 617..... 27
Stewart v. United States, 300 F. 786..... 43
Sunderland v. United States, 19 F. (2nd) 202..... 39
Thornhill v. State of Alabama, 310 U. S. 88.....12, 20
Turinetti v. United States, 2 F. (2nd) 15..... 40
Tingle v. United States, 38 F. (2nd) 573..... 40
United Leather Workers v. Herkert, 265 U. S. 457... 21
United Mine Workers v. Coronado, 259 U. S. 344... 21
United States v. Allis, 155 U. S. 117, 15 S. Ct. 36, 39 L. Ed. 91..... 43
United States v. Burr, Fed. Cas. 14, 694, Coombs' on Aaron Burr 369..... 27
United States v. Gideon, 52 F. (2nd) 431..... 43
United States v. Graves, 112 F. (2nd) 89-91..... 33
United States v. Gramlich, 19 F. Supp. 422.....17, 19, 21
United States v. Hutcheson, 312 U. S. 219....13, 30, 36, 38
United States v. Interstate Circuit, 20 F. Supp. 868.. 18
United States v. Koch, 113 F. (2nd) 952 33
United States v. Fox, 95 U. S. 670..... 21
United States v. Local 807, 118 R. (2nd) 684 .....11, 17, 18, 27, 40

United States v. McGlone, 19 F. Supp. 285.....17, 35
United States v. Smith, 112 F. (2nd) 83..... 33
Wilson v. United States, 117 F. (2nd) 253..... 39

Other Authorities Cited.

Constitution of the United States, Art. IV, Sec. 4.... 22
Congressional Record, Vol. 78, pp. 5732, 5735, 5859, pp. 11402-3, 11482..... 17
Amendment One to the Constitution..... 12
Amendment Five to the Constitution..... 22
Amendment Ten to the Constitution..... 21

Statutes Cited.

Title 15, Section 1, United States Code, Sherman Anti-Trust Act 2
Title 18, Section 420a to 420e, United States Code, Anti-Racketeering Act 1, 2, 9, 12, 17, 22, 39
Title 29, Section 51, United States Code, or Section 20, 38 Stat. 738, Clayton Act.....12, 19
Title 28, Sections 101-105, United States Code, Norris-LaGuardia Act 12, 19
Title 29, Section 151-2, United States Code, National Labor Relations or Wagner Act..... 12
Title 18, Section 557, United States Code, Criminal Procedure 20

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above cause on August 30, 1941, affirming the judgment of conviction of the United States District Court for the Eastern Division of the Eastern Judicial District at the City of St. Louis and State of Missouri, convicting the petitioners of violation of 48 Stat. 979, Title 18, U. S. C. A., Section 420a, "Anti-Racketeering Act."

SUMMARY.

This is a criminal case commenced in the United States District Court for the Eastern District of Missouri by an indictment (R. 14-60) returned by grand jury on the 11th day of June, 1940 (R. 14).

The indictment is in twelve counts and charges petitioners jointly in the first eleven counts with violating 48 Stat. 979, Title 18, U. S. C. A., Section 420a, "Anti-Racketeering Act"; the twelfth count charges violation of 26 Stat. 209, Title 15, U. S. C. A., Section 1, "Sherman Anti-Trust Act."

The jury returned verdict finding defendants guilty as charged in counts 1 to 11 and not guilty as charged in count 12. The respective sentences were five years imprisonment upon each count, to run concurrently, and a fine of ten thousand dollars upon the first count.

The petitioners appealed to the Circuit Court of Appeals for the Eighth Circuit on September 24, 1940 (R. 1), which Court, on the 30th day of August, 1941, affirmed the judgments and sentence of the District Court (R. 937). (Opinion not yet reported, but printed at R. 915-938.) Petition for rehearing was overruled on October 1, 1941 (R. 957) and the Court stayed issuance of mandate October 6, 1941 (R. 961).

STATUTE INVOLVED.

The Act of June 18, 1934, c. 569, 48 Stat. 979, 18 U. S. C., Sec. 420 (a) *et seq.*, provides in part as follows:

> Sec. 2 (420a). Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

Sec. 3 (a) (420b). As used in this Act the term "wrongful" means in violation of the criminal laws of the United States or of any State or Territory.

(b) The terms "property", "money", or "valuable considerations" used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee.

* * * * * * *

Sec. 6 (420d). Any person charged with violating this Act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: Provided, That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

STATEMENT.

The indictment alleges three separate transactions.

(a) **First transaction.**[1]

The petitioners were members of International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, hereinafter referred to as IATSE, and had been for more than thirty years. In 1935 internal strife broke out in Local Union No. 143 and the national officers of the organization placed petitioner Nick, who was then International First Vice-President, in complete charge of Local Union No. 143. The affairs of Local Union No. 143 were taken up at the thirty-third annual convention of the IATSE and the national convention ratified, by resolution (Def. Ex. 38, R. 661-3; admitted at R. 656), the act of the national officers in placing petitioner Nick in charge of Local Union No. 143 and ordered petitioner Nick to maintain strict domination over Local No. 143; suspended the local constitution and by-laws of the local union; empowered him to take full charge, conduct the affairs and to demand and accept the resignations of the officers of Local No. 143. In accordance with this mandate of the national convention, Nick assumed full charge of the union affairs, ironed out many difficulties (R. 159), completely unionized all theatres in St. Louis and St. Louis County (R. 160), increased wages of operators, secured the passage of city ordinances mak-

1 The first count (R. 14-24) alleges a conspiracy, under subsection (a) of the act, to directly and substantially interfere with the distribution of films in interstate commerce by making high wage demands for moving picture operators and threatening to strike unless demands were met by employer, then lowering demand when paid money for personal use. (Note: The money paid agent belongs to principal.) Count 2 charges (R. 24-29) the same conspiracy under subsection (b) of the act. Count 3 (R. 29-32) charges substantive offense of obtaining money, under subsection (a) of the act. Count 4 (R. 33-36) charges substantive offense of attempting to obtain money under subsection (a) of the act. Count 5 (R. 36-40) charges substantive offense under subsection (b) of the act of obtaining the same money as charged in count 3.

ing movie booths safe against fire, and sanitary, and requiring two operators per booth (R. 160).

The Government's evidence (R. 107-128) showed that films are manufactured in states outside Missouri, shipped to film exchanges in Missouri and distributed by these film exchanges to various theatres; that if the theatres were closed for any reason the number of films coming into St. Louis would be curtailed. The film exchange executives testified that the petitioners did not interfere with the shipment of films (R. 112, 123, 127), and two of these stated that they did not know the petitioners and had had no dealings with them. **These witnesses proved that petitioners did not interfere with the distribution of a single film.**

The 1936 wage contract between the exhibitors and operators expiring August 31, 1937, the exhibitors and petitioners signed, on September 1, 1937, a contract or truce (R. 299, Gov't Ex. 11a, p. 6; offered by Gov't and admitted R. 306-307), wherein Local Union No. 143 agreed **not to strike** or abandon the theatres pending negotiations for the 1937 wage contract and the exhibitors agreed, in this truce, to appoint a committee to negotiate with the union representatives and to ratify the committee's action. The agreement provided that wages would be adjusted as of September 1, 1937, regardless of the time when contract might be signed.

The first five counts of the indictment cover these negotiations for the 1937 wage contract. The committee and the petitioners met on September 8, 1937. The committee proposed a reduction of wages of from 10 per cent to 15 per cent (R. 253-318); the petitioners offered a counter-proposal calling for a reclassification of theatres on a seating capacity basis (Gov't Ex. 9, R. 248-250; admitted R. 571). The membership was informed of the progress of the

negotiations, notwithstanding that petitioner Nick was in full charge by virtue of the mandate of the national convention (Def. Exs. 8, 9, R. 669-670); admitted R. 667); meetings between the exhibitors and the petitioners continued, but no progress was made. Both sides were adamant. No actual threats of strike were made at any of these meetings (R. 331-363); no demands for money were made by the petitioners (R. 269).

Witness Wehrenberg, over objection, was permitted to testify concerning a conversation held between the members of the committee out of the presence of the petitioners (R. 261-263). Member Kaimann said, "It looks like there's going to be another picnic" (R. 263), and Mr. Thimmig said, "It looks very much like it." Kaimann testified, over objection (R. 345), that because petitioners were still insisting on reclassification of theatres for wage rates the committee was commencing to get worn out; that on the way downstairs he casually said to one of the committee members, "It looks like they want another picnic." Then the witness (R. 347) was permitted to relate a conversation he held with news reporters in 1936 that "picnic" was a term used to mean "pay-off." The petitioners moved for a mistrial (R. 347). Witness Pappas testified (R. 359) that at one of the meetings Mr. Thimmig said, "Well, I will go back and see if I can **do something** to regulate all matters with them."

Thimmig testified that he held several meetings with petitioner Weston and finally agreed to pay "him" $7,500 (R. 326). Thimmig and Kaimann set about raising money from the theatre owners and thereafter, on November 24th, the committee delivered sixty-five hundred dollars to Mr. Weston, at which time Weston delivered a signed contract for the 1937 wages (Gov't Ex. 11, R. 279-287; admitted R. 306). The contract provided for a small increase in wages

and reduced free warm-up time (R. 320). Local No. 143 approved the contract (Def. Ex. 10, R. 673; admitted R. 667). All members of the committee testified that no demand for money was made to the whole committee nor was any threat to strike communicated to the committee.

Komm, a member of the committee (R. 363), was asked:

"Q. They never said they wanted a pay-off?
A. They never said at any time that they expected anything from the committee.
Q. Did you have any feeling of fear or apprehension?
A. No, sir; I didn't."

Witness Wehrenberg testified (R. 316):

"Q. Now, you testified that Mr. Weston told you that there was to be a strike on theatres, that unless you signed a contract, is that right?
A. No, he didn't say there was going to be a strike.
Q. What did he say?
A. He said there would be no operators on theatres today."

Harry C. Arthur, for the first-run houses (Fanchon and Marco), testified that an agreement was reached with the petitioners without any increase in wages; that no payment was demanded by the petitioners nor was any made, and (R. 400) that no threat to strike was made other than the implication of a strike is implied in a demand for higher wages.

"Every time you have negotiations a strike is always implied. If you don't get together with them on negotiation, you are always looking towards a strike. I never had wage negotiations in my life that I didn't anticipate that if we didn't get together the men would walk out."

(b) **Second transaction.**[1]

The evidence concerning counts 6 to 10 begins at R. 414 and shows that petitioner Weston, in September, 1936, organized and incorporated the Co-operative Sound Service Supply Company, a Missouri corporation, for the purpose of servicing sound equipment in theatres. The members of the union were notified by letter (Gov't Ex. 16, R. 423; admitted R. 571) on September 12, 1936, that article I, section 3, of the international by-laws of the union forbade nonunion members to service theatre sound equipment and warned the operators not to violate the rule. At that time theatres in St. Louis were being serviced by RCA and Electrical Research Products, Inc., national organizations. On October 12, 1936, the membership was notified that the Co-operative Sound Service Supply Company had signed an agreement with the local to employ only members of the union in accordance with the rules of the IATSE (Gov't Ex. 17, R. 429; admitted R. 571). The Co-operative Sound Service Supply Company employed Jesse Cook, the only union sound service engineer in St. Louis. The national organization was negotiating with RCA and ERPI, which negotiations were concluded about December 13, 1937. Their operators then became members of the union and were permitted thereafter to service sound equipment in the theatres. Petitioner Weston was appointed business manager of Local No. 143 in January, 1937. He sold his shares of the stock to Thomas J. Canavan, who became president and manager of Co-op. Canavan testified (R. 552) Co-op.'s charges were only $5.50 per week,

---

1 Count 6 (R. 40-43) alleges a conspiracy under clause (a) to directly and substantially interfere with the distribution of films in interstate commerce by forming a corporation to service sound equipment in theatres, petitioners using their position in the union to cause theatre owners to take the company's service and shared in profits of company. Count 7 (R. 43-46) alleges same conspiracy under clause (b). Count 8 charges substantive offense of obtaining money under clause (a). Count 9 (R. 46-48) charges attempt to obtain same money under clause (a), and count 10 (R. 48-51) charges obtaining same money under clause (b).

while RCA and ERPI charged an average of $15.00 per week; that Co-op. rendered better service than its competitors; that he gave part of his salary to petitioners. Interstate commerce was not involved and petitioners received no money from theatre owners.

(c) **Third transaction.**

The eleventh count is covered by the testimony of Harry C. Arthur, Jr. (R. 383-4). The Orpheum Theatre in St. Louis was closed. Fanchon & Marco wished to reopen it as a second-run house rather than a first-run house and thereby use lower paid operators. Arthur loaned petitioner Weston $2,000. No threats were made and interstate commerce was not involved.

JURISDICTION.

The judisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (United States Code, Title 28, Section 347).

THE QUESTIONS PRESENTED.

1. Is the indictment sufficient?

(a) Does the Anti-Racketeering Act exempt Labor and its representatives from prosecution under the act for incidents growing out of negotiations for wage contracts by virtue of section 420 (a) and proviso of 420d (Sec. 6)?

(b) Does a threat to strike by a labor union constitute interference with interstate commerce?

(c) Is the operation of moving picture projecting machine interstate commerce under the act?

(d) Is negotiation for wage rates for moving picture operators interstate commerce?

(e) Does the Anti-Racketeering Act limit or nullify the National Labor Relations Act?

(f) Were the three distinct transactions properly joined in one indictment?

2. Is the Anti-Racketeering Act constitutional under the First, Fifth and Tenth Amendments and art. 4, sec. 4?

3. Is hearsay admissible in evidence? And may witnesses relate third-party conversations held outside the presence of the accused?

4. Is there any competent proof to support the verdict: (a) as to interstate commerce; (b) as to threats of force and violence; (c) as to conspiracy?

5. Did the Court err in refusing to give petitioners' requested instructions?

6. Did the trial court properly declare the law: (a) as to what constitutes interstate commerce where a labor union is involved; (b) as to what stoppage affects such commerce; (c) as to what constitutes actionable threat by a labor union; (d) as to circumstantial evidence; (e) as to "unless * * * proven guilty beyond a reasonable doubt, conviction must result"; (f) as to two purposes; (g) as to Allen instruction?

7. Is the verdict of "guilty" on the first eleven counts consistent with the verdict of "not guilty" on the twelfth count, when interference with or restraint of interstate commerce is a necessary and essential particular of each of the counts?

REASONS FOR GRANTING APPLICATION FOR WRIT.

I.

The decision of the Circuit Court of Appeals as to the construction of section 420d (the proviso exempting Labor from the operation of the act) by holding that the petitioners, as labor leaders, can be punished under the act for threatening to call a strike in connection with wage scale negotiations, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit on the same matter in the case of United States v. Local 807, 118 F. (2nd) 684 (certiorari granted October 13, 1941).[1] In the Local 807 case, delegates and members of the union, by concerted action and in some instances with actual violence, stopped interstate trucks and demanded and received money from them. The Second Circuit held (l. c. 686):

> "For the foregoing reasons, we do not believe that the act made it a crime for labor union to get jobs or an increase in wages for its members, even by threats of violence."

The majority opinion further held (l. c. 688):

> "Furthermore, the proviso to section 420d, although that, too, is most obscure, at least shows a vague intention to discriminate between violence in labor disputes and elsewhere."

Circuit Judge Clark, in concurring in the majority opinion, said, p. 689:

> "I agree that it is 'most obscure' and also that it 'at least shows a vague intention to discriminate be-

[1] Since the Court has granted certiorari in U. S. v. Local 807, it would seem that it should be granted here, also, in order to resolve the conflict, as well as for the reasons set forth at page 10, No. 131, the petition of U. S. for writ in U. S. v. Local 807.

tween violence in labor disputes and elsewhere.' It may therefore mean, in effect, that the acts of violence here made a federal crime do not include such acts when occurring in otherwise legitimate activities of bona fide (i. e., non-outlaw) labor organizations. If the word 'otherwise' should be omitted from this statement, if the acts of violence themselves render the union activities not legitimate, then the proviso becomes wholly meaningless, since it would then say that union activities are excepted only when they do not violate the act. * * * Perhaps final interpretation should not now be attempted, but as at present advised, I think conviction cannot be had where the acts or threats complained of are part of an endeavor of members of a bona fide labor organization to carry out their otherwise legitimate objects."

II.

The decision of the Circuit Court of Appeals as applied to labor unions is contrary to the labor policy of the United States as expressed in the Norris-La Guardia Act, the Wagner Act, the Clayton Act, and the exceptions contained in the Anti-Racketeering Act, and if adhered to will destroy organized labor, making every effort by Labor to secure higher wages a crime against the laws of the United State; therefore, there is urgent need for an authoritative decision by this Court on a question of public importance and federal law, which has not been, but should be, settled by this Court.

III.

The Circuit Court of Appeals' decision is in conflict with this Court's decision in Thornhill v. State of Alabama, 310 U. S. 88, in that it denies employees the right to communicate wage demands to employers and thereby denies them freedom of speech guaranteed by the First Amendment.

IV.

The opinion of the Circuit Court holding that the threat to strike by a labor union constitutes an act of interference with interstate commerce is in conflict with the applicable decisions of the Supreme Court in the cases of Apex Hosiery Company v. Leader, 310 U. S. 469, and United States v. Hutcheson, 312 U. S. 219.

V.

The Circuit Court held that hearsay evidence and third-party conversations, held out of the presence of the defendants, are admissible in evidence and thus so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision.

Wherefore, your petitioners respectfully pray that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals herein be granted.

SIGMUND M. BASS,
BRYAN PURTEET,
Attorneys for Petitioners.

Of Counsel:

WARREN E. MILLER,
Washington, D. C.

Dated St. Louis, Missouri, October ...., 1941.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. .....

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eight Circuit is not yet reported, but will be found at record pages 915-938.

JURISDICTION.

The opinion of the Circuit Court was rendered on August 30, 1941; rehearing denied October 1, 1941. On the 6th day of October, 1941, an order was entered staying the mandate of the Circuit Court of Appeals for the purpose of permitting the within application for writ of certiorari.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

STATEMENT OF THE CASE.

The statement of the case is contained in the petition.

SPECIFICATIONS OF ERROR.

I.

The Circuit Court erred in holding the indictment sufficient at law.

II.

The Court erred in holding that the Anti-Racketeering Act is constitutional.

III.

The Court erred by holding that witnesses could testify to hearsay statements, conclusions and third-party conversations out of presence of defendants.

IV.

The Court erred in holding that the verdict of the jury is supported by any competent evidence.

V.

The Court erred by refusing to consider petitioners' requested instructions.

VI.

The Circuit Court erred in holding that the trial court's charge to the jury was proper, inasmuch as such charge misstated the law and was prejudicial.

VII.

The verdict of the jury is inconsistent, inasmuch as it finds the defendants not guilty of the twelfth count of the indictment, which contains all the essential allegations contained in the first eleven counts on which the defendants are found guilty.

ARGUMENT.

I.

The Circuit Court Erred in Holding the Indictment Sufficient at Law.

(a) **History and interpretation of act.** The Anti-Racketeering Act, Sections 420a to 420e, Title 18, U. S. C. A., was enacted June 18, 1934. The first bill was passed by the Congress (C. R. 78, p. 5735); organized labor objected to it as being dangerous to labor (C. R. 78, p. 5859); the original bill was withdrawn. The Attorney-General conferred with labor; a new bill was written excluding bona fide labor organizations and their legitimate activities from the bill and passed in the present form (C. R. 78, pp. 11402-3, 11482).

This Act seems to be an extension of the Sherman Act to cover stoppage of interstate goods in transit. Senate Report 532, C. R. 78, 5732.

There are three reported cases construing the act, viz.:

United States v. Gramlich (D. C. Ill., 1937, 19 F. Supp. 422), holding indictment sufficient.

United States v. McGlone (D. C. Pa., 1937, 19 F. Supp. 285), holding labor exempted under section 420d.

United States v. Local 807 (C. C. A. 2, 118 F. [2nd] 684, certiorari granted 10-13-41), holding union excluded where money was obtained by force and violence in the guise of wages, though no labor was performed, only offered to be performed.

The case at bar holds the obtaining of money by labor's agents in connection with wage negotiations under threat to strike to be a violation.

The Second Circuit, in commenting on the act, said, "The whole statute is very loosely drawn." In order to give meaning to the act, it is necessary to read it as follows:

> Any person who obtains * * * by the use * * * or threat to use force, violence or coercion, payment of money * * * (not wages) in connection with or in relation to **any act** (which) in any way or in any degree affects trade or commerce, etc.

Thus, the act requires the doing of three separate and distinct acts. First, the stoppage of interstate commerce; second, a threat to use force and violence or coercion; and third, the taking of money.

The words "any act" must refer to the act committed against commerce, and such act must be distinct and independent of and a necessary prerequisite to the threat.

A threat to call a labor strike, being a lawful act, cannot constitute the first required act. The obtaining of money in connection with labor negotiations cannot constitute the third act, because section 420d exempts labor from responsibility for threats of force and violence occurring during labor negotiations (Point 17, R. 62, Motion to Quash; Points 10, 11, 12, R. 70-71, Demurrer).

> "Furthermore, the proviso to section 420 (d), although that too is most obscure, at least shows a vague intention to discriminate between violence in labor disputes and elsewhere." United States v. Local 807, 118 F. (2nd) 684, C. C. A. 2.

Furthermore, the operation of a projecting machine in a St. Louis theater is not an interstate commerce operation. The exhibition itself, of a motion picture film, is state commerce and beyond interstate regulations (United States v. Interstate Circuit, 20 Fed. Supp. 868).

Moreover, even if the operation of motion picture ma-

chines were interstate commerce, films were not the subject of petitioners' activities; wages of operators was the thing in dispute.

The labor policy of the United States, as expressed in the National Labor Relations Act, Sec. 151, Title 29, U. S. C., is to "encourage the practice and procedure of collective bargaining by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid and protection." The Norris-La Guardia act, Secs. 104-105, Title 29, U. S. C., forbids federal courts issuing injunctions against labor organizations and its members from "ceasing to work" (striking) or "advising or notifying any person" to cease working. This Court has ruled, in United States v. Hutcheson, 312 U. S. 219, that these acts enumerating the labor policy of the United States must be interlaced and construed with the Sherman Antitrust Act when determining whether labor substantially and directly restrained interstate commerce. The same reasoning ought to apply to a construction of the Anti-Racketeering Act where it is applied to a set of facts growing out of collective bargaining by a bona fide labor organization negotiating for a wage contract. Since the indictment shows on its face that petitioners were representing the IATSE (R. 15 and 16, Pars. 10 and 11), a bona fide labor union, and negotiated the 1937 contract providing for hours and wages (R. 19, Par. 17), a legitimate objective, it brings itself squarely within the exemption in proviso to section 420d and, therefore, fails to state an offense under the act.

It is plain that counts one and two cover the same alleged conspiracy and that counts six and seven cover the same conspiracy. Each conspiracy is split contrary to the

Court's decision. In re Snow, 120 U. S. 274. It will be noted the Circuit Court failed to rule on this assignment (R. 925-926).

Three separate and distinct acts were joined in the indictment. The second transaction had nothing to do with the first and the third transaction did not grow out of either the first or second. These were not offenses that might be "properly" joined under 557, Title 18, U. S. C. A. Beaux Arts v. United States, 9 F. (2nd) 531. Misjoinder was raised in demurrer (R. 61[8]-70[9]) and motions to elect (R. 80-575, 802).

II.

The Court Erred in Holding that the Anti-Racketeering Act Is Constitutional.

(a) **Denies defendants freedom of speech.** In Thornhill v. State of Alabama, 310 U. S. 88, this Court held:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution (cases cited).
>
> • • • • • • •
>
> "We concur in the observation of Mr. Justice Brandeis, speaking for the Court in Senn's case (301 U. S., at page 478): 'Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.'
>
> • • • • • • •
>
> "It does not follow that the state in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridg-

ment of freedom of speech and of the press concerning almost every matter of importance to society."

It would be an anomalous situation which permits labor leaders to inform the public of a controversy, but punishes them for communicating their demands to the employers. **If the Government can police the conversations between the employee and the employer and prosecute the employee because he makes high demands, such is tantamount to denial of freedom of speech.** Freedom of speech in a labor dispute is essential. If it can be curtailed by the employer merely reporting to the Government that the demand for wages is high and excessive, then the beneficent labor policy announced by Congress in the Clayton, Norris-La Guardia and Wagner Acts has been completely nullified and labor's lips have been sealed. Unless this act wholly exempts labor, it is unconstitutional. There can be no halfway station. If it is not unlawful to strike and picket, how can it be unlawful to threaten to strike and picket?

(b) **Violates the Tenth Amendment.** The act is so broad as to be unreasonable. It attempts to cover every crime which in any way, however remotely or indirectly, touches an article which might have at some time in the past or any time in the future pass state borders. The act offends the principles laid down in the following cases:

Standard Oil v. United States, 221 U. S. 1;
United Mine Workers v. Coronado Co., 259 U. S. 344;
United Leather Workers v. Herkert, 265 U. S. 457;
Levering & Garrigues v. Morin, 289 U. S. 103;
Apex v. Leader, 310 U. S. 469;
United States v. Hutcheson, 312 U. S. 219.

In United States v. Fox, 95 U. S. 670, the Court said:

"But an act committed within a state, whether for a good or bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the

> United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate."

In Schecter v. U. S., 295 U. S. 495, this Court said:

> "* * * the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction."

Article IV, Section 4, of the Constitution, expressly reserves the right of the states to deal with domestic violence:

> "The United States shall guarantee to every state in the Union a Republican form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."

Title 18, Section 420a, undertakes to deal with domestic violence. Therefore, it is unconstitutional. Does the Congress have the right to invade state jurisdiction and deal with domestic violence under the Commerce Clause?

(c) **Fifth Amendment**: If the Congress intended to exercise concurrent jurisdiction with the states on crimes of extortion and violence committed in interstate commerce, it should have provided for concurrency with the states and provided against double jeopardy in order to save the constitutionality of the act along the lines provided

under Section 410, Title 18 (thefts from interstate shipments) and Sections 412 and 412a, Title 18 (embezzlement by an officer of an interstate carrier), without which the act violates the Fifth Amendment in that it places an individual in double jeopardy.

III.

The Court Erred by Holding That Witnesses Could Testify to Hearsay Statements, Conclusions and Third Party Conversations Out of Presence of Defendants.

The amazing disregard of rules of evidence by the trial court calls for reversal of this case. The assignment of errors sets forth thirty-two pages of hearsay evidence (R. 868-900), third party conversations and telephone conversations between third parties held outside the presence of defendants. Witnesses were permitted to state what was running through their minds, even their appraisal of mental attitudes of third parties. One witness was permitted to relate a conversation he had with a newspaper reporter. The record contains reams of this sort of testimony. We urgently request the Court to read the record from pages 261 to 405 (note the testimony was let in over the objection and exception of petitioners). The Court will note the objections and exceptions throughout the record. Note objection and exception at record 262, the ruling of the Court that objection and exception stood to all such testimony (R. 263, 267, 324, 346, 351, 359).

At record 262, over objection and exception, Wehrenberg relates a third party conversation with Kaimann. Objection, exception, motion to strike and motion for mistrial preserved in Assignments of Error (R. 870-1; Kaimann's statement was a conclusion based on past events and therefore not properly admissible. McLaughlin v. U. S., C. C. A. 3, 26 F. 2d 1).

At record 263 the witness relates what one Kaimann, a third party, is reported to have told a newspaper reporter in 1936. A mistrial was moved at record 264. At record 270, the same witness testified concerning a telephone conversation he had had with a third party (Thimmig) out of the presence of petitioners. At record 274-5, the Government complained to the Court that it could not make its case unless this hearsay was admitted, whereupon the Court obligingly reversed himself and let the hearsay in. At record 321 Thimmig testified to what Kaimann said; at record 324, to a conversation between Kaimann and himself; at record 325, as to Kaimann's attitude. At record 347, Kaimann relates a newspaper report of his conversation. Note objection, exception, motion to strike and motion for mistrial.

Witness Komm (R. 364) is permitted to testify to a telephone conversation he had with Thimmig. Louis K. Ansell (R. 368-370) is permitted to testify as to what Arthur had said to a group out of the presence of the defendants after he had had a conversation with them and as to the group's attitude. Witness Arthur (R. 384) relates a conversation he had with the Ansells and Bess Schueler regarding their attitude on making a payoff if the matter should come up. This conversation took place before any negotiations had ever been opened with the defendants. Witness Rosecan testified concerning conversations he had had with Tom Canavan out of the presence of the defendants (R. 494). This witness also testified about a conversation held with Mr. Ansell. Witness Sanowski (R. 498) is permitted to testify to conversations he had with Mr. Canavan.

The foregoing are only a few of the hearsay statements and third party conversations shown in the record and assignment of errors.

In Mima Queen v. Hepburn, 7 Cranch. 289, 3 L. Ed. 348, by Marshall, C. J., hearsay is held inadmissible, not only because it supposes better evidence, but also

> "its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible."

The Circuit Court holds (R. 930) such testimony admissible to show a state of mind, overlooking that it is thereby permitting one of the parties to a written contract to testify to matters merged in the contract. The state of mind of the exhibitors was absolutely irrelevant to this case and the proviso in 420-d is a rule of evidence as well as a prohibition when applied to this case. Rather than permitting a relinquishment of the rule against hearsay, as the Court would, the statute forbids consideration of employers' mental state. Had the theatre owners granted the demand for higher wages this case would have died a-borning.

The kind of fear, if any, suffered by the exhibitors was not a genuine fear, such as contemplated by the act, but was merely a state of anxiety present in the mind of any employer when negotiating with his employees for a wage contract, who knows that if the demands of the employees are not met a strike may ensue. Indeed, the testimony in this case showed that wage negotiations in themselves implied the threat of a strike (R. 400). If the fear created by demands for higher wages creates coercion, actionable under this act, collective bargaining has ended.

The Circuit Court holds (R. 930) that unless there is some form of compulsion there is no crime under this act. The act provides that the compulsion which results from the activities of a bona fide labor organization in pur-

suing an objective must not be construed by a court to be actionable force or violence, fear or coercion. Every demand for higher wages, shorter hours and better working conditions creates compulsion.

The Circuit Court says (R. 930): "If the exhibitors had paid this money of their own initiative and voluntarily, there would have been no violation of the act." We respectfully suggest that there is nothing in the record to show that they did not pay it voluntarily. The payment, if any, to petitioner Weston was voluntary. The owners were not forced to pay it. If they did pay him they did so for purposes of their own. They exercised their judgment and will by choosing to raise money. The Court's decision is erroneous under its own hypothesis.

After all, what connection with or relation to interstate commerce does the giving of money to union agents by theatre owners have, whether it is given as a bonus or as a good-will offering as insurance against higher wages for their employees? In any event, it belongs to the principal, the union, and must be accounted for by the agents.

The means, methods and manner of the negotiations cannot be the subject of prosecution under this act. Congress knew abuses in these means and methods could arise, but in the interests of the national labor policy chose to leave their punishment to the states, just as Congress leaves the punishment of many other local crimes to the states. There are many heinous crimes committed every day which are not matters for federal jurisdiction, but must of constitutional necessity be left to the state government for punishment. Federal jurisdiction does not arise from the ethics of the deed, but must spring from a power delegated to the United States. The Congress must have recognized the possibility of labor being charged for extortion in communicating the wage demands, and for that reason ex-

empted it from operation of the act. Employers could contend any amount above that which they wished to pay to be extortion and bring about a prosecution. This distinction is clearly recognized in United States v. Local 807, 118 F. (2nd) 684, where the Court said (l. c. 688):

> "It is not unreasonable to ascribe to Congress the purpose of observing this distinction and of leaving to the states the maintenance of order in cases of disorders in labor disputes. True, it may be asked why Congress should not also have left to the states the suppression of such disorders as the act indubitably does forbid. That we cannot answer, and indeed it would not be proper for us to import the distinction which we have, if the language used did not demand it. We have tried to show how it was the inevitable consequence of what was said; and it fortifies our conclusion that there was a possible purpose for the distinction. Furthermore, the proviso to section 420d, although that, too, is most obscure, at least shows a vague intention to discriminate between violence in labor disputes and elsewhere."

Does a fancied state of mind of the employers render admissible the many third-party conversations held out of the presence of petitioners?

> "In a criminal prosecution, conversations and statements of third parties, not made in presence of defendant or hearing of defendant, are incompetent hearsay."
>
> State v. Woodward, 90 S. W. 90, 191 Mo. 617;
> U. S. v. Burr, 14 Fed. Cas. 694, Coombs on Aaron Burr 369;
> Bass v. U. S., 20 App. D. C. 232.

Does a supposed state of mind render the conclusions of witnesses admissible? In Masonic Home of Missouri v. Windsor, 92 S. W. (2nd) 713, 338 Mo. 877, the Court said:

> "What witness did 'not know' or what 'impression'

> he may have had, or what he 'thought' or 'understood' or 'supposed' or 'figured' did not rise to dignity of evidence establishing issuable facts, and such observations, except 'I don't know,' were mere conclusions, and not evidence of probative value."

There was no evidence of any threat being made by petitioners. Even if there had been evidence of a threat to strike, that in itself would constitute no violation of this act. However, the Government deemed it necessary to its case to use this inadmissible testimony in order to create a mysterious inference of implied threat and thereby invited reversible error.

IV.

The Court Erred in Holding the Verdict of the Jury Is Supported by Any Competent Evidence.

It must be borne in mind that the indictment alleges that petitioners "directly and substantially affected commerce," not merely that they "interfered with commerce." Allegata et probata. United States v. Gramlich, supra. There is no proof whatever of even an indirect or remote interference with interstate commerce, but even if there was proof of interference, it, in itself, would not support the conviction in the absence of proof that such interference was direct and of a substantial nature. The Government attempted to prove, by inadmissible hearsay evidence, that there was an implied threat of a strike in connection with wage negotiations. If it had proven this fact the evidence would still be insufficient, because strikes and threats to strike are permissible under the labor policy of the United States. However, the so-called implied threat to strike is nothing more than an inference or presumption based upon presumption, and shows what possibly **might have** happened and how **maybe** commerce **could**

have been interfered with **if** * * *. The Government relied upon the testimony of witnesses Wehrenberg (R. 240), Thimmig (R. 317), Kaimann (R. 341), Pappas (R. 357) and Komm (R. 361). It established by each of these witnesses the fact that negotiations were under way between the IATSE, a bona fide labor organization, and the theatre owners. The Government, having established this fact, thereby brought the case under the exception contained in the proviso of Section 420d and all subsequent testimony became irrelevant and incompetent. A careful analysis of the evidence disproves that interstate commerce was directly and substantially interfered with or that any article of interstate commerce was involved. The only question before these contracting parties was the wages of the moving picture operators in St. Louis. Further analyzing we see that no actual threat even to strike was made by the petitioners, but rather that the committee inferred or presumed that if they refused to pay the wages asked a strike might ensue. Therefore, rather than pay the rate of wages asked, the committee initiated a plan of its own to circumvent the payment of higher wages and sent one of their members (Thimmig) to petitioner Weston and arranged to give him a sum of money. Members of the committee testified that this sum of money was raised without considering the consequences of a strike and without any fear. Witness Thimmig testified (R. 331):

> "Q. Did you consider the consequences of a strike? A. We didn't get that far. Naturally, if we didn't have no contract, I imagine they would have pulled their men or something. We never got that far."

Witness Komm (R. 362):

> "Q. Let me ask you, what was your own state of mind, your own attitude? These negotiations had proceeded for several meetings and they had insisted on $30.00 per man, and did that create in your mind any

question that Nick and Weston were expecting any pay-off? A. Well, I don't know. During that time that we spoke to them they had never gave me the least thought that they expected anything.

Q. They never said they wanted a pay-off? A. They never said at any time that they expected anything from the committee."

Whether the theatre owners were afraid of a strike was irrelevant to any issue in this case, in view of the labor policy of the United States as expressed in the Wagner Act and in the Norris-La Guardia Act. The possibility of a strike is implicit in all negotiations between employer and employee. Therefore, any fear of a strike that arises in the mind of the employer could not be actionable under this act. Witness Arthur (R. 400):

"A. Every time you have negotiations, a strike is always implied. If you don't get together with them on negotiations, you are always looking toward a strike. I never had wage negotiations in my life that I didn't anticipate that if we didn't get together the men would walk out."

The Government did not attempt to establish that the operation of a theatre in St. Louis is interstate commerce. It attempted to satisfy the statutory requirements of interstate commerce by showing merely that films pass in interstate commerce and that the distribution thereof is interstate commerce, and that if a strike were to take place in the St. Louis area that the distribution of film would be curtailed. Such might be true as to any product, any part of which passes in interstate commerce, but it is wholly inadequate to show that persons negotiating for wage contracts in St. Louis directly and substantially interfered with or restrained interstate commerce. This Court held, in both Apex v. Leader and United States v. Hutcheson, that where the intention is to enforce the rights

of labor, the possible restraints of trade are beside the point and not actionable.

There is no proof that the theatres could not operate even if a strike occurred. In fact, the proof (R. 779) shows that nonunion operators were available in large numbers; hence, a strike, if called, would not close the theatres. At record page 789 the evidence shows that any intelligent person can learn to operate a moving picture machine in ten or fifteen minutes. It is common knowledge that many persons operate motion picture machines in their own homes. Therefore, the proof is insufficient to show that a strike, which is a permissible thing under the decisions, would close the theatres; so the inference of an implied strike does not confirm the Government's theory. The fact that another union was about to be organized, and some of the theatre owners were flirting with it, shows that other operators were available (R. 354).

There is no proof that the distribution of films was interfered with. The film exchange executives testified that **petitioners did not interfere with film distribution** (R. 112-122-127); therefore, the assumption postulated in paragraph 18 of the indictment, while erroneous in that it intermingles exhibition (noninterstate activity) with distribution, is not supported in any respect. Mr. Schweitzer of Paramount (R. 112) testified that neither of the petitioners had either **kept him from shipping any film or caused him to fail to ship any film.** Mr. Robyn of United Artists testified (R. 122) that he did not know either Mr. Nick or Mr. Weston and that **neither at any time interfered with interstate shipment of films.** Mr. Ray Nolan of RKO testified (R. 127) that in his twenty-one years experience in St. Louis there had never been any **strikes by the operators; that he never in his life saw either of the petitioners; that he did not know of them interfering**

with any of his company's interstate shipments of film. These witnesses testified that they were **never threatened** in any way by either of the petitioners **and not one cent was demanded.** The Government's case collapsed with the testimony of these witnesses.

The evidence under the second transaction, namely, the organization of the Co-operative Sound Service Supply Company, failed to establish even a moral offense. The evidence shows that the manager of that company gave the petitioners a part of the salary paid him by the corporation. The Government contended that because the theatre owners in St. Louis paid the corporation $5.50 per week for sound service that, therefore, the theatre owners had paid money to the petitioners. There was no proof that the Co-operative did not furnish efficient service; in fact, there was proof that its service was better than that of its competitors and that Co-operative charged $5.50 per week for its service while its competitors charged almost three times as much—$15.00 per week (R. 552).

All of the testimony concerning this phase of the case is irrelevant and immaterial to the issue of interference with interstate commerce and no money was obtained from the exhibitors. The servicing of sound equipment permanently placed in St. Louis theatres is not interstate commerce in any sense of the word.

There is no known reason, either legal or moral, why the manager of Co-operative could not give his money to any persons he might choose, including the petitioners. The joining of this wholly distinct transaction in the indictment was erroneous and the admission of evidence under it was prejudicial to the petitioners. It constitutes a practical demonstration of the injustice of permitting the joining of separate and independent transactions and trying them in one trial. When the accused are tried on different

transactions in one indictment, each transaction must be proved, and if there is a failure of proof as to any one the case must be reversed. United States v. Smith (2 Cir.), 112 F. (2nd) 83; United States v. Koch (2 Cir.), 113 F. (2nd) 952; United States v. Graves (2 Cir.), 122 F. (2nd) 89-91.

The evidence under the third transaction was insufficient. It shows, however, that the whole case was tried by the Government and put to the jury by the Court on the theory it is an offense to obtain money in connection with wage negotiations. The proof showed that the Orpheum Theatre was closed and, therefore, not using any film. Fanchon & Marco wished to open it as a second-run house instead of a first-run house, as it had been before its closing. A second-run house could operate with lower salaried operators and fewer stage hands. Arthur, the manager for Fanchon & Marco, loaned petitioner Weston $2,000. There is no proof of any interstate commerce connected with this closed theatre; there is no proof of any threat of any kind; there is no proof of any demand for money. In fact, in the proof of this transaction the Government abandoned its far-fetched theory as to a threat to strike being interference with interstate transportation of film and relied on the theory that the receipt of money in any form by a union agent during negotiations for wages constitutes a violation of the Anti-Racketeering Act.

As to the second and third transactions, it is obvious there are gross variances between the allegations and proof. The record shows that the petitioners demurred to the misjoinder of counts (R. 61 and 70); that motions to elect were filed (R. 80, 577, 802) before, during and at the close of the evidence; demurrers to the evidence were filed (R. 572-804), overruled and exception thereto (R. 573-806) and preserved in the assignments of error (900[24-26]-901).

While the following allegations were irrelevant to the cause being prosecuted, we wish to point out to the Court that the Government failed to sustain the allegation of paragraph 20 that the defendants seized control of Local No. 143. Defendants' Exhibit 3 (R. 633, admitted 632) shows they were placed in control of No. 143 by the national officers, and Defendants' Exhibit 31 (R. 625, admitted 618) shows that the national organization had authority to place them in charge. The allegation that the defendants insured and perpetuated their control over the operators by giving some better jobs than others is not sustained, because the authority exercised by the defendants did not depend upon the operators, but came from the national organization. It is not against the law for union officials to ask for high, arbitrary, excessive and ruinous wages. This is merely a matter of judgment; labor leaders are not required to have perfect judgment, and whether a wage demand is high or excessive depends upon whether you view it as an employer or as an employee. It is not illegal to call strikes or threaten to call strikes.

There was no proof that the union did not receive the $6,500 alleged to have been paid defendant Weston, or that it was not used for the benefit of the union. If the owners gave petitioner $6,500 to get a contract he received it as agent for the union and it must be taken to be a bonus for signing the contract, which is a common practice. There is no evidence, and certainly no law, which prevents theatre owners in St. Louis from raising a fund of money and giving that money away through a committee.

Thus we see that the evidence is wholly insufficient. Viewed from any angle, it will not support the convictions. First, there was no independent act of interference with interstate commerce—films were in no way involved; the

matter was a plain labor dispute; the competent evidence does not even support the allegations that there were threats or implied threats—this was only established by permitting witnesses to testify that they imagined a pay-off was wanted.

The Court should have sustained the defendants' demurrers to the evidence, as did Judge Welsh in the case of United States v. McGlone, 19 F. Supp. 285.

Conspiracy is essentially a crime of intent. The intent of the defendants is shown by the proof to be the securing of a wage contract calling for wages. This they did. They did not intend to interfere with interstate commerce —and did not. Therefore, we refer again to Apex v. Leader, supra, which holds that where a sitdown strike actually interfered with interstate, but because the intent was unionizing employees, there was no unlawful interference with interstate commerce.

V.

The Court Erred by Refusing to Consider Petitioners' Requested Instructions.

The petitioners requested trial court to give 23 instructions (R. 806-817). He refused (Exception, R. 848, assignment 906[39]).

It is not necessary to point out specifically the error of the trial court in refusing requested instructions when the requested instructions clearly state the law and the charge given is contrary to the law.

It is held in Gold v. United States, 102 F. 350 (C. C. A. 2):

> " 'Where a timely request is made for instructions which correctly propound the law and which are warranted by the pleadings and the evidence in the case,

> it is the duty of the Court to give them unless covered by other instructions given, or by the general charge, and a noncompliance with this duty will necessitate a reversal where it cannot be said that appellant was not prejudiced * * *.' "

VI.

The Circuit Court Erred in Holding That the Trial Court's Charge to the Jury Was Proper, Inasmuch as Such Charge Misstated the Law and Was Prejudicial.

The Court's definition of interstate commerce (R. 823-824; exception, R. 844; assignment, R. 901), as applied to the activities of a labor union, was incomplete and inaccurate in that it did not conform to that set forth in Apex v. Leader, 310 U. S. 469, and United States v. Hutcheson, 312 U. S. 219, which decisions specifically hold that so long as a labor union or its representatives do not curtail commercial competition, they do not and cannot affect interstate commerce in such a manner as to be prosecuted therefor.

We ask the Court to note the inconsistency in the Court's charge (R. 823; exception, R. 844; assignment, R. 902):

> "* * * and that the defendants in agreement upon such a plan, if one was agreed upon, knew that the consummation and accomplishment of such a plan would result in directly and substantially affecting interstate commerce in film."

Contrast this with what the Court said at record 824:

> "In that connection you are instructed that it is not necessary to a conviction that the defendants consider the plan itself, the effect the consummation of the plan would have had upon interstate commerce or that the principal purposes or one of the purposes of the conspiracy, if there was one, was to directly or substantially interfere with or affect interstate commerce."

How could there be a conspiracy to interfere with interstate commerce, without a purpose to do so? First, the Court tells the jury that the defendants must know their plan will substantially and directly affect interstate commerce, then the Court says it is not necessary that the purposes shall be to directly and substantially interfere therewith. This is inconsistent. If defendants intended to secure a contract they are exempt under 420d and the incidental results on commerce are immaterial. Apex v. Leader.

In Nicola v. United States, 72 Fed. (2nd) 780, l. c. 787, the Court said:

> "Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn."

It was error for the Court to instruct on the interstate character of films without instructing as requested in defendant's request No. 5 (R. 808) that the exhibition of films is not interstate commerce.

> "The exhibition itself of a motion picture film is state commerce and beyond interstate regulations" (United States v. Interstate Circuit, 20 Fed. Supp. 868).

In charging the jury, the Court erred in advising them as follows (R. 826, Exception 844, Assign. 902):

> "If the evidence of the witnesses outlining the effect of stoppage of motion picture industry in St. Louis is to be believed and is believed by you, the result, of course, is direct and substantial interference with or effect upon interstate commerce. It is for you to say whether you believe such evidence, not me. I don't mean by that to cast any aspersions on the

evidence at all. As I recall, the evidence was uncontradicted, but that, too, is for you to recall for yourselves."

There was no such testimony. The testimony was simply that there could be a stoppage, but regardless of this a stoppage caused by a strike is not actionable. U. S. v. Hutcheson.

Such an expression and statement by the Court is an unjustifiable and improper comment by the Court upon the evidence and invades the province of the jury. By such a statement the Court as much as says, using the skeleton or meaning of the above-quoted part of the Court's charge: "If the evidence of the witnesses • • • is believed by you, **the result, of course**, is direct and substantial interference with or effect upon interstate commerce." In other words, the jury must believe that there is direct and substantial interference upon interstate commerce if they believe the evidence of witnesses. They are left with no right to an opinion of their own. The Court has told them **"the result, of course, is direct and substantial interference."**

The Court followed up his improper statement, not by telling the jury that they were not bound by his opinion that **"the result, of course, is direct and substantial interference"** and by saying to the jury that it was for them to determine what the evidence means and results in, but by saying to them that his belief or disbelief **in the testimony of the witnesses** was not binding upon the jurors, but **that the jurors were to make up their own minds as to whether or not to believe such evidence**, when, as a matter of law, the jury not only had the right, but had the duty, of determining, first, whether to believe such evidence, and, secondly, whether or not, in their opinion, such evidence did or did not, as the Court said, mean only the one thing which the Court said it did mean, to wit, **"the result, of**

course, is direct and substantial interference with • • • upon interstate commerce."

Brabright v. U. S., 105 Fed. (2nd) 202;
Sunderland v. U. S., 19 Fed. (2nd) 202;
Wilson v. U. S., 117 Fed. (2nd) 253.

The Court charged the jury at R. 823, exception 844, assignment 901 (g):

"The making of a threat or the receipt of money would constitute such an act."

This is not only unfair comment by the Court, but is also an erroneous statement of the law. The violation of this Act, if there can be one, consists of first doing an act that actually interferes with interstate commerce; and, secondly, follows such act by a threat to obtain money by use of force or violence. The threat itself, or the obtaining of the money, is not the act of interference denounced. Before the Court could have given any such instruction in this case the proof would necessarily have to have shown beyond a reasonable doubt that there was an actual stoppage of films which directly and substantially affected interstate nationally, followed by obtaining money by threats.

What is a threat in a case of this kind? It cannot be anything said or done in connection with wage negotiations. The Supreme Court has held in both the Apex and Hutcheson cases that strikes and threats to strike by labor unions are permissible and do not unlawfully restrain or interfere with interstate commerce.

The Anti-Racketeering Act permits the securing of the payment of wages by threats of force and violence (Section 420a). The Anti-Racketeering Act forbids United States Courts from construing it **in any manner** affecting labor organizations; hence, labor organizations or their leaders may use threats of force and violence in their ne-

gotiations for wage contracts (proviso, Section 420d). The use of force and violence is legitimate under this Act and the leading decisions. U. S. v. Local 807, supra.

The Court erred in charging the jury (R. 836, Exception 847) that circumstantial evidence as to petitioner did not cover all counts.

We contend that the Court erred in this instruction, because, as to the defendant John Nick, not only is there no evidence that he was paid or received any money, as said by the Court, but, as will appear from the evidence in this case upon a careful reading, there is no direct evidence in the whole case which would even tend to prove the charge in the light of the Government's and the Court's interpretation of the statute upon which the case is bottomed. So far as the defendant John Nick is concerned, all, if anything, that the Government has shown under each and every count in the indictment, and each and every count under which defendant John Nick was convicted, was circumstantial evidence and such circumstantial evidence as in law will not uphold a conviction, same being one inference from and based upon another inference, and one presumption from and based upon another presumption.

Gargotta v. U. S., 77 Fed. (2nd) 977;
Tingle v. U. S., 38 Fed. (2nd) 573;
Cox v. U. S., 96 Fed. (2nd) 41;
Turinetti v. U. S., 2 Fed. (2nd) 15.

The Court further erred in his discussion of circumstantial evidence, as appears on record page 838:

In this particular portion of the Court's charge it may be noted the Court said: **"The force and value of circumstantial evidence depends upon the number of facts and circumstances established which are consistent with each other and the consistency of those facts and circumstances with**

the truth or existence of the facts sought to be shown.'' Such a statement by the Court as to the measure and value of evidence is so illogical and unreasonable as to condemn itself upon first reading. According to this interpretation the quantity of evidence would determine the issues in a matter rather than the quality of evidence and the weight thereof. Upon this theory a dozen trivial circumstances, only in the slightest connecting a defendant with an offense, would outweigh a single circumstance which might in itself conclusively establish guilt; for example, any number of slight and trivial circumstances could not compare in value in some classes of cases with the single circumstance of finding a defendant's finger prints upon an object connected with the proof of the corpus delicti. By the Court's test of establishing the ''force and value'' of circumstantial evidence the jury is taught to measure evidence by false weights and values.

The Court charged [at R. 839, exception 846, Assign., R. 903 (m)]:

> ''Unless the Government has proven guilt beyond a reasonable doubt, **a conviction must result.''**

This astounding statement is only surpassed by another one made a little later on the same subject. What chance do defendants have for acquittal under such bludgeoning by the Court? On counsel's exception to this prejudicial charge, the Court undertook to cure it by saying it was a slip of the tongue. The liberty of American citizens should not be jeopardized on slips of the tongue. The Court's correction was unavailing. There is no way to unscramble eggs.

The Court charged at record page 841, exception 847, assignment 903, that if petitioners had two purposes, one to secure wages, and another to secure money for themselves, a conviction should result.

Here the Court assumed a legislative role and arbitrarily read foreign matters into the statute, contrary to the congressional intent specifically expressed in this act, and in contravention to the general labor policy of the United States as expressed in the Norris-La Guardia Act and the Wagner Act.

Such interpretation does impair, diminish and affect the rights of labor. **If courts and juries may speculate on the mental processes of labor leaders in order to conjure up a second purpose, it would be hazardous for any leader to ever make a demand for wages higher than existing rates.** He would thereby subject himself to prosecution. **Collective bargaining would immediately end. The employer would thereby be clothed with a more formidable weapon than injunction processes,** swept away by the Norris-La Guardia Act.

This part of the charge constituted an argument to the jury. The Court drove home its point by citing the Dyer Act. The example does not fit this case in any respect. There isn't any proviso in the Dyer Act that labor and labor leaders are exempt from its provisions, as there is in Section 420d. If the Dyer Act had a proviso in it exempting labor leaders who go to Springfield, Illinois, on union business in automobiles, the example might be analogous. The Court's example was ill chosen and misleading. It is indeed dangerous to import other laws into any case, and especially a case of this kind. **When the Government established by the allegations of the indictment and the proof that the defendants were members of bona fide labor unions and represented them in wage negotiations, and further showed that wage contracts were actually consummated, it proved itself out of court.** This Court should have sustained demurrers to the evidence rather than in effect making an argument for conviction.

The Court finally administered a sledgehammer blow in attempting to give the so-called Allen instruction before ever the jury had retired to consider the case. This part of the charge was extremely coercive and practically urged the minority to give in to the majority and **"vote for a conviction"** (R. 842, Exception 847, Assignment 905).

(See attempt to change record by affidavit, R. 851.)

We take it that the reporter's original transcript stands and the record cannot be changed by affidavit. Counsel are firm in the belief that the Court did say, "Vote for a conviction," and our belief is buttressed by the fact that the Court had, just previous to that, erroneously charged that a "conviction must result." Therefore, it would appear that the word "conviction" was uppermost in the Court's mind.

The very fact that this unfair charge was given before the jury had ever deadlocked, thereby necessitating the giving of further instructions, demonstrates, in our opinion, that the instruction was given to coerce the jury. In the case of United States v. Gideon, 52 F. (2nd) 431, the Court criticized the trial court for attempting to give the Allen instruction before the case had been placed in the hands of the jury. The abuse here was even greater than there. In United States v. Allis, 155 U. S. 117, the Supreme Court holds that supplementary instructions are in order only when "the jury have a difficulty in reaching a verdict." The charge here, when weighed against Judge Sanborn's pronouncement in Stewart v. United States, 300 F., l. c. 786, is thoroughly bad. In the foregoing cases the trial courts at least waited until a deadlock arose before interposing.

There are many other errors in the charge to which exceptions were taken.

Does the presumption of innocence survive in a trial where hearsay evidence is admitted to supply the inference of the main essential (implied threat) and the court directs conviction? Did petitioners have a fair trial?

VII.

The Verdict of the Jury Is Inconsistent, Inasmuch as it Finds the Defendants Not Guilty of the Twelfth Count of the Indictment, Which Contails All the Essential Allegations Contained in the First Eleven Counts on Which the Defendants Are Found Guilty.

By acquitting the defendants on the twelfth count the jury thereby found them not guilty of interfering or restraining interstate commerce, because interference and restraint of interstate commerce were the primary essentials of the twelfth count. Interference with interstate Commerce was the primary charge in each of the first eleven counts. If the jury found there was no interference with interstate commerce under the twelfth count, which was predicated upon precisely the same facts as each of the first eleven counts, then to be consistent the jury should have found, and was under a duty to find, no interference with interstate commerce under any count. The gravamen of all counts is interference with interstate commerce. There being no interference under count twelve, there could be none under counts one to eleven. Dunn v. United States, 284 U. S. 390.

In Speiller v. United States, 21 F. (2nd) 682 (C. C. A. 3), it was very aptly said:

> "When the liberty of a citizen is at stake juries will not be permitted to make a plaything of a verdict and blow hot and cold at the same time."

CONCLUSION.

It is therefore respectfully submitted that, for all the foregoing reasons, the petitioners' application for writ of certiorari should be allowed as prayed.

Respectfully submitted,

SIGMUND M. BASS,
BRYAN PURTEET,
Attorneys for Petitioners.

Of Counsel:

WARREN E. MILLER,
Washington, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
Argument	9
Conclusion	14

CITATIONS

Cases:	
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	10
Binderup v. *Pathe Exchange, Inc.*, 263 U. S. 291	12
Consolidated Edison Co. v. *National Labor Relations Board*, 305 U. S. 197	11
Dunn v. *United States*, 284 U. S. 390	14
Interstate Circuit, Inc. v. *United States*, 306 U. S. 208	12
McKelvey v. *United States*, 260 U. S. 353	12
Mutual Life Ins. Co. v. *Hillmon*, 145 U. S. 285	13
National Labor Relations Board v. *Fainblatt*, 306 U. S. 601	12
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1	11, 12
Paramount Famous Lasky Corp. v. *United States*, 282 U. S. 30	12
Thornhill v. *Alabama*, 310 U. S. 88	11
United States v. *Darby*, 312 U. S. 100	12
United States v. *General Motors Corp.*, 121 F. (2d) 376, certiorari denied, October 13, 1941	14
United States v. *Hutcheson*, 312 U. S. 219	10
United States v. *Lanza*, 260 U. S. 377	12
United States v. *Local 807*, 118 F. (2d) 684, certiorari granted, October 13, 1941	9
United States v. *Trenton Potteries Co.*, 273 U. S. 392	4
Statute:	
Act of June 18, 1934, 48 Stat. 979, 18 U. S. C., sec. 420 (a) *et seq*	2
Miscellaneous:	
Wigmore, Evidence (3d ed. , secs. 1766, 1788	13
Wigmore, Evidence (3d ed.), sec. 1790	13

426148—41— 1

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 712

JOHN P. NICK AND CLYDE A. WESTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 915) is reported in 122 F. (2d) 660.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 30, 1941 (R. 937), and petition for rehearing was denied on October 1, 1941 (R. 957). Petition for a writ of certiorari was filed October 22, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judical Code, as amended by the Act of February 13, 1925, and as modified by Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court.

QUESTIONS PRESENTED

(1) Whether the action of labor union representatives in obtaining, by coercion, money for their own personal use in consideration for betraying the interests of the union members whom they assume to represent constitutes "lawfully carrying out the legitimate objects" of a labor organization within the meaning of the proviso to section 6 of the Anti-Racketeering Act.

(2) Whether money obtained from motion-picture exhibitors under threat of calling a strike which would interrupt the interstate flow of films to these exhibitors is money obtained "in connection with * * * any act * * * affecting [interstate] trade or commerce" within the meaning of section 2 of the Anti-Racketeering Act.

(3) Whether a statute which makes it criminal for a labor union representative to extort, during the course of wage negotiations, money for his own personal use violates the First, Fifth, or Tenth Amendment.

(4) Whether the district court erred in its rulings on the admission of evidence or in its charge to the jury.

STATUTE INVOLVED

The Act of June 18, 1934, 48 Stat. 979, 18 U. S. C., sec. 420 (a) *et seq.*, provides in part as follows:

> That the term "trade or commerce", as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.
>
> SEC. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

SEC. 3. (a) As used in this Act the term "wrongful" means in violation of the criminal laws of the United States or of any State or Territory.

(b) The terms "property", "money", or "valuable considerations" used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee.

* * * * *

SEC. 6. Any person charged with violating this Act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: *Provided,* That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

STATEMENT

Petitioners were convicted under the first 11 counts of an indictment, each of which charged violation of the Act of June 18, 1934, known as the Anti-Racketeering Act. They were acquitted under a 12th count charging violation of the Sherman Act. Each petitioner was sentenced to five years' imprisonment under each of the first 11 counts, the sentences to run concurrently, and each was also fined $10,000 under count 1 (R. 859, 861). On appeal, the Circuit Court of Appeals for the Eighth Circuit affirmed the convictions.

The first five counts are concerned with the acts by which petitioners obtained a cash payment of $6,500 from an association of St. Louis motion-picture exhibitors in connection with signing a contract covering wage rates for employees of these exhibitors for the year beginning September 1, 1937.[1] The next five counts deal with the coerced payment of money by St. Louis exhibitors to a corporation providing service for sound equipment which petitioners had organized and in the profits of which they shared.[2] The 11th count relates to petitioners' extortion, in 1937, of $2,000 from the owners and operators of the Orpheum Theatre in St. Louis.

Since petitioners' sentences run concurrently and the judgments of conviction must be affirmed if the convictions under count 1 are valid (*United States* v. *Trenton Potteries Co.*, 273

[1] Count 1 charges a conspiracy to obtain money by force, violence, and coercion; count 3 charges obtaining money by such means; count 4 charges an attempt to obtain money by such means; count 2 charges a conspiracy to obtain the property of another, with his consent, induced by wrongful use of force and fear; count 5 charges obtaining such property in this manner (R. 14–40).

[2] Count 6, like count 1, charges a conspiracy to do acts prohibited by section 2 (a); counts 8 and 9, like counts 3 and 4, charge violations of section 2 (a); count 7, like count 2, charges a conspiracy to do acts prohibited by section 2 (b); count 10, like count 5, charges violation of section 2 (b) (R. 40–53).

U. S. 392, 401–402), we shall limit our statement to the conspiracy charged in count 1.[3]

The charge in the first count is that there is a continuous interstate movement of films in and out of St. Louis (R. 16–18); that the sole objective of this interstate movement is local exhibition and any interference therewith would directly affect and curtail the interstate flow of films (R. 17, 19–20); that exhibition of films in theatres requires the operation of projection machines by skilled employees referred to as operators (R. 18); that substantially all operators in St. Louis are members of Local 143 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, referred to herein as IATSE (R. 18); that petitioners conspired to obtain money from St. Louis exhibitors by using and threatening to use force, violence, and coercion, and, as a part of this conspiracy, (a) obtained control of Local 143, (b) made excessive, arbitrary, and bogus demands for wage increases for operators employed by St. Louis exhibitors, (c) threatened strikes of the operators if petitioners' demands were not met, and (d) intimidated the exhibitors by surrounding themselves and the headquarters of Local 143 with men of known bad reputation, vicious disposition, and known criminal records,—all for the purpose not of securing wage increases or better working conditions for the operators but for the purpose of coercing the exhibitors to pay money to petitioners for "their personal use and profit" (R. 20–21, 23).

The evidence fully substantiates these averments. The continuous interstate movement of films shipped to and from the film exchanges which motion-picture distributors maintain in St. Louis and the effect which a stoppage of local exhibition

---

[3] The court below likewise confined its discussion to count 1 except where disposition of a particular assignment of error required consideration of some other count (R. 916).

would have upon this movement are established by uncontradicted evidence.[4] There was likewise evidence that during the indictment period St. Louis theatres were 100% organized (R. 133, 160), that only members of Local 143, or members of IATSE having the permission of Local 143, could work as operators in St. Louis (R. 133, 214), and that a strike by Local 143 would force motion-picture theatres in St. Louis to close (R. 330, 350, 351).

The evidence that petitioners completely dominated the affairs of Local 143 is detailed and overwhelming. Petitioner Nick, first vice-president of IATSE, was placed in complete charge of the affairs of Local 143 by George E. Browne, president of IATSE, in 1935.[5] Browne informed the membership that Nick's orders were to be obeyed the same as if he, Browne, had issued them and that any member refusing to obey Nick would be suspended (R. 133, 223). Nick, upon taking charge of the affairs of the Local, advised its members that anyone who violated his orders or who attempted to go over Nick's head would have his union card torn up (R. 130, 133).[6] Upon Nick's assumption of control, the officers of Local 143 resigned (R. 129), elections were omitted (R. 134), and the executive board of the Local was abolished (R. 140, 141, 796). About 63 men were made members by Nick without vote of the membership, including two of Nick's chauffeurs and others who were not qualified operators (R. 141, 147).

For a number of years prior to 1935 petitioner Weston had been a representative of IATSE sent out on special assignments by it (R. 133). When Nick took over control of Local 143 in July 1935 he told the members that Weston would be

---

[4] R. 107–112, 115, 117–120, 126–128, 572; Govt. Ex. 8, par. 13, R. 221. A part of this evidence is summarized in the opinion of the court below (R. 918).

[5] R. 129, 133; Def. Ex. 38, R. 661, 663. While the court stenographer, in reporting the oral testimony, spelled the president's name "Brown", the correct spelling, as shown by the documentary evidence (Def. Ex. 5, p. 5, R. 717; Def. Ex. 38, R. 661), is "Browne".

[6] Without a union card, an operator could not work in St. Louis (R. 133, 231, 508).

in charge of the Local and that an order issued by Weston would be the same as one issued by Nick (R. 130). From October 1935 to January 1937 one Tomsen was business manager of the Local, but in January 1937 Nick ousted Tomsen and sent the members a written notice stating that Weston would be business manager and that he would be "my personal representative and handle all affairs of Local 143, until further notice" (R. 136, 206; Govt. Ex. 5, R. 137).

There was likewise clear and convincing evidence establishing what was referred to in the testimony as the 1937 "pay-off".

The Motion Picture Theatre Owners of St. Louis, Eastern Missouri and Southern Illinois is an association of subsequent-run theatres in the territory indicated by the Association's name (R. 241). The Association annually negotiated on behalf of its members an agreement with Local 143 covering a one-year period beginning September 1 (*ibid.*). In the negotiations for an agreement for the year beginning September 1, 1936, Nick and Tomsen represented Local 143 but at the last minute Tomsen was dropped and the final agreement was made by Nick alone (R. 135–136, 341–342). The union had demanded an increase in wages; but during the negotiations one Edward M. Brady [7] told the exhibitors' committee that, for a cash payment, he could obtain a contract "like we had the year before" (R. 244–246). The exhibitors finally agreed to pay him $10,000 for a renewal of the old contract without any increase in wages, and on the day that such a contract was signed they paid Brady $10,000 in cash (R. 244–247, 341–345; Govt. Ex. 12, R. 343).

In the contract negotiations for the year beginning September 1, 1937, petitioners represented Local 143 and a committee of the Association represented the exhibitors (R. 247–248, 358). At the first meeting petitioners demanded a wage scale which

[7] Edward M. Brady, known as "Putty Nose" Brady (R. 142, 246, 341), was not a member of Local 143 (R. 142) but claimed to be a representative of Browne (R. 244–246).

constituted a 75% increase, from $40 to $70 a week, for operators in Class "D" theatres and smaller percentage increases for theatres falling in higher classifications (R. 248–251). A majority of the theatres represented by the Association were Class "D" houses and adoption of the proposed wage scale would have forced the smaller theatres to close, and petitioners were so advised (R. 251, 254, 318, 345, 362). When petitioners persisted in their demands, the exhibitors gained the impression that the demands were not made in good faith but were the stage setting for a shakedown or pay-off.[8] Weston finally informed a member of the exhibitors' committee that if paid $10,000 he would help in getting them a satisfactory contract (R. 322–323, 325). After Weston had agreed to accept $7,500, the exhibitors, who were confronted with what they considered to be an impossible wage contract or a strike, undertook to collect this sum from their members and by November 24 had collected $6,500 (R. 326–335). After the understanding for a pay-off had been reached the attitude of petitioners, which had been arrogant up to that time, completely changed (R. 352, 356, 358–359).

On November 24, 1937, the day before Thanksgiving, Weston telephoned one of the committee members and said: "I am kind of getting tired getting kicked around with this contract * * *. If the contract is not signed today, there will be no operators tomorrow, I will pull the operators" (R. 270). The three committee members engaged in making collections were then hurriedly assembled, met Weston at a bank and turned over to him $6,500 in bills of small denominations and he then delivered a wage contract signed by Nick (R. 270–274, 333–337, 350–352). While this contract provided for slightly higher wages, it increased working hours so that the net effect, although slight, was to lower the earnings of the operators (R. 234, 320, 351, 794, 795, 797).[9]

---

[8] R. 254, 259–260, 261–263, 267–269, 320–322, 345–348, 356.

[9] Petitioners' brief (p. 26) characterizes the pay-off as "a bonus or as a good-will offering as insurance against higher wages for their employees."

On the first business day following the pay-off Weston delivered $2,500 in cash to a real estate company in part payment of a loan extended to him to finance a house he was building (R. 511–512, 518; Govt. Ex. 19, p. 3, R. 517).

At a banquet held to "celebrate" the signing of the 1937 contract Nick in a speech to the members of Local 143 told them that the contract was "signed, sealed and delivered", that whether they liked it or not they were "going to have to like it" (R. 235, 793, 797, 801, 802).

It was not until some time after January 1939 that the members of Local 143 got back control of their own union and succeeded in ousting petitioners, and then only by virtue of an equity proceeding in the Circuit Court of St. Louis (R. 226–227).

ARGUMENT

I

Petitioners contend (pp. 11–12) that the decision below is in conflict with *United States* v. *Local 807*, 118 F. (2d) 684 (C. C. A. 2), certiorari granted, Nos. 131–132 present Term, October 13, 1941. The court there held that where a person who has made a proffer of service which was not accepted obtains money by force or violence, the money so obtained is within the clause of the Anti-Racketeering Act exempting "wages paid by a bona-fide employer to a bona-fide employee". But petitioners not only never were, they never even sought to become, employees of the St. Louis exhibitors. The holding in *United States* v. *Local 807* has therefore no application whatever to the present case.

Grant of certiorari in the instant case would not present any question of statutory construction which is or may be before this Court in the *Local 807* case. In that case this Court may find it necessary to determine whether members of a labor union who obtain money as the price for abstaining from violent interference with interstate operations are "lawfully carrying out the legitimate objects" of a bona-fide labor organization.

within the meaning of the proviso of section 6 of the act. This proviso has no application to the present case, unless it can be said that acceptance of bribes by labor-union officials in consideration for selling out the interests of the union members whom the officials represent constitutes "lawfully carrying out the legitimate objects" of a labor organization. To advance such a construction of the statute is, as the court below said (R. 935), "an astonishing proposition," since the construction converts a proviso enacted for labor's protection into a shield for those engaged in betraying labor. The court below said (R. 935):

> Obviously, the only purpose or possible reason for employers bribing such racketeers in connection with wage negotiations is to secure lower wages than honest negotiations would probably produce. How such a situation can possibly result in anything but harm to the innocent members of the labor organization is not clear. * * *

II

Petitioners urge (p. 13) that the decision below is in conflict with *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and *United States* v. *Hutcheson*, 312 U. S. 219. The apparent basis for the contention (petition, pp. 30–31, 36, 39) is that these cases establish as a general principle of law that interference with interstate commerce can never give rise to a cause of action against a labor union or a representative thereof (at least unless commercial competition is curtailed). It is scarcely necessary to point out that these cases represent merely a construction of particular statutory provisions and that they do not lay down any principle of law of the kind suggested, to be applied to any and all federal legislation. Indeed, the *Apex* case itself points out the difference in policy between the Sherman Act and the Anti-Racketeering Act. 310 U. S., at 491–493.

Petitioners' contention (pp. 31–32) that, in the absence of proof that their conduct resulted in some actual stoppage

or diminution of interstate commerce, the jury's verdict was without support in the proof seems to be based upon the view that in these circumstances there was no evidence of extortion "in connection with or in relation to any act * * * affecting [interstate] trade or commerce." The question of statutory construction thus raised is, we submit, without substance. When petitioners forced the exhibitors to choose between paying them a bribe and having the interstate movement of films to exhibitors brought to an end by a strike closing their theatres, their act in threatening a strike indubitably was an act "affecting" interstate commerce and the $6,500 which they thereupon received indubitably was obtained "in connection with" such act. Decisions under the National Labor Relations Act show that conduct which leads or tends to lead to a labor dispute obstructing the free flow of commerce is conduct "affecting" interstate commerce irrespective of whether commerce has been obstructed in the particular case. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 221–222. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Co.*, 301 U. S. 1, 43. Here the proof showed not merely conduct which *tended* to cause obstruction but conduct which directly threatened immediate obstruction.

III

Petitioners contend that the Anti-Racketeering Act as applied in this case is unconstitutional.

They urge (pp. 20–21) that under the holding in *Thornhill* v. *Alabama*, 310 U. S. 88, the Act violates the First Amendment. We submit that nothing in that decision even remotely suggests that there is any infringement of the constitutional guarantee of freedom of speech when Congress makes it a crime for a labor representative to extort money for his own personal use, by betraying those whom he assumes to represent. Extortion is not protected by the First Amendment whenever threats are delivered by word of mouth.

Petitioners' contention (pp. 21–22) that the statute violates the Tenth Amendment is, we submit, equally without merit That amendment merely states the truism that all powers not surrendered to the national Government are retained by the States; it becomes operative only if and when it appears that Congress, in a particular exercise of power, has exceeded the powers delegated to it by the Constitution. *United States* v. *Darby*, 312 U. S. 100, 123–124. Under the *Darby* case and under decisions upholding the National Labor Relations Act,[10] it cannot be doubted that the Anti-Racketeering Act is a valid exercise of the commerce power of Congress. Nor can there be any question as to the validity of the Act as here applied. For practices which interrupt the flow of film from distributors to exhibitors have frequently been held to restrain and obstruct interstate commerce. *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291, 309–311; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30; *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208.

Petitioners' contention (pp. 22–23) that the statute violates the Fifth Amendment is, we submit, likewise unsound. The fact that the same conduct may be an offense against both the United States and against a State does not constitute double jeopardy within the Fifth Amendment. *United States* v *Lanza*, 260 U. S. 377, 382–384; *McKelvey* v. *United States*, 260 U. S. 353, 358–359.

IV

Petitioners contend that the district court erred in its admission of evidence, in its instructions to the jury, and in its refusal to give requested instructions. They also assert that the verdict is inconsistent. These alleged errors raise no question which warrants review by this Court. We submit, moreover, that the questions raised present no ground for reversal.

1. The alleged erroneous rulings as to evidence are carefully considered in the opinion of the court below (R. 928–933).

---

[10] Cf., *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.

We deem it unnecessary to supplement the court's discussion except to cite authority for the settled rule that a witness may testify as to statements made by a third person where, as in this case, the testimony is admitted, not in proof of the facts stated, but to show the state of mind of the person making the statement.[11]

2. The opinion below likewise discusses fully the alleged errors in the district court's charge to the jury (R. 934–936). We merely add minor comments called for by the brief in support of the petition for certiorari. Petitioners lay great stress (Br. pp. 41, 43) on a statement in the record as transcribed which the court reporter subsequently swore to be incorrect,[12] and on an obvious slip of the tongue by the judge which in its context (R. 839) would not have misled the jury, and which was corrected when called to the court's attention (R. 846).[13] The excerpt from the charge (R. 824) set forth at the bottom of page 36 is incorrectly quoted in a manner which makes it not entirely intelligible. Petitioner also criticizes (Br. p. 39) as an unfair construction of the Anti-Racketeering Act a sentence which in its context can be seen to be only an accurate description of what constitutes an overt act under the conspiracy statute.[14]

---

[11] *Wigmore*, Evidence (3d ed.), sec. 1790; *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 295–300. See also *Wigmore*, Evidence (3d ed.), secs. 1766, 1788.

[12] Petitioners assert that the court charged the jury to "vote for a conviction" (R. 843). In an affidavit subsequently filed, the court reporter stated that a re-examination of his shorthand notes showed that the expression should have been transcribed as "vote for your conviction" (R. 850–852). This correction is borne out both by a statement by the judge (R. 852) and by the context of the remark (R. 843).

[13] The record shows that after charging the jury that presumption of innocence continues with the defendant and entitled him to an acquittal unless the jury is convinced beyond a reasonable doubt of his guilt, the court stated, "Unless the Government has proven guilt beyond a reasonable doubt, a conviction must result" (R. 839).

[14] At the end of the second paragraph on R. 823 the court defined the offense of conspiracy as consisting of "the forming of a plan to commit an unlawful act and the advancement of such a plan * * * by some act of one or more of the conspirators. The making of a threat or the receipt of money would consitute such an act." Petitioners treat the last sentence as if it applied to the Anti-Racketeering Act generally.

3. Petitioners are not in a position to raise the question of error in the denial of their requested instructions to the jury since in the court below they did not give any specification of such error (R. 933).

4. Petitioners contend (p. 44) that the verdicts of conviction under the Anti-Racketeering Act and of acquittal under the Sherman Act are inconsistent. Not only is there patently no inconsistency (R. 936–937), but inconsistency in the verdict of a jury is not a ground for reversal. *Dunn* v. *United States*, 284 U. S. 390; *United States* v. *General Motors Corp.*, 121 F. (2d) 376, 411 (C. C. A. 7th), certiorari denied, No. 352 present Term, October 13, 1941.

CONCLUSION

The decision below is clearly correct and is not in conflict with any applicable decision of this Court or of another Circuit Court of Appeals. The questions of statutory construction and of constitutionality which petitioners seek to raise are without substance. It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
CHARLES H. WESTON,
Special Assistant to the Attorney General.

NOVEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

(5)

Office - Supreme Court, U. S.
FILED
NOV 21 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 712.

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY TO GOVERNMENT'S BRIEF.

SIGMUND M. BASS,
100 North Broadway,
St. Louis, Missouri,
BRYAN PURTEET,
705 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioners.

Of Counsel:
WARREN E. MILLER,
Washington, D. C.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

SUBJECT INDEX.

	Page
1. The whole indictment must be analyzed because of split conspiracy and improper joinder of unrelated transactions	1
2. There is a plain conflict of decisons	2
3. Wage dispute not related to interstate transportation of films	3
4. Freedom of speech is directly involved	3
5. Hearsay never admissible	4
6. Third party conversations were inadmissible	4
7. The Supreme Court should construe the language of the act because of public importance	4
8. Petitioners' interpretation	4-5
9. Professor Sullivan's interpretation	6

Cases Cited.

In re Snow, 120 U. S. 274	2
Murphy v. United States, 285 F. 801	2
United States v. Brace, 149 F. 874	2
United States v. Groves, 122 F. (2nd) (C. C. A. 2) 87	2
United States v. Hutcheson, 312 U. S. 219	2
United States v. Koch, 2nd Cir., 113 F. (2nd) 982	2
United States v. Local 807, 118 F. (2nd) 684	3, 4
United States v. Smith, 2nd Cir., 112 F. (2nd) 83	2

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 712.

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY TO GOVERNMENT'S BRIEF.

This case cannot be fully considered by merely analyzing count one of the indictment, as suggested by respondent at pages 4 and 5 of its brief, because the indictment is divided into three transactions which are not related. Transactions two and three do not in any sense involve interstate commerce, and it was error to join the three transactions. Evidence admitted in support of transactions two and three was prejudicial to the petitioners. Transactions two and three were not proved to come within the purview of the act and therefore must result in a reversal of the whole case, regardless of any conclusion that may be reached as to the first transaction, because there was insufficient evidence to show that either transaction two

or three were violations, or that petitioners were guilty of violating the Anti-Racketeering Act in connection with these two transactions. In the case of United States v. Groves, 122 F. (2nd) (C. C. A. 2) 87, the Court held that where the jury was allowed, over objection, to consider together defendant's guilt of the violation of the mail fraud statute in respect to each of three frauds alleged, each was required to be proven. On failure to prove all, the conviction was reversed. United States v. Smith, 2nd Cir., 112 F. (2nd) 83; United States v. Koch, 2nd Cir., 113 F. (2nd) 982.

Furthermore, counts 1 and 2 cover the same transaction and thereby split a conspiracy, which is contrary to the decisions of this Court. There can be but one prosecution based upon a single conspiracy. United States v. Brace, 149 F. 874; Murphy v. United States, 285 F. 801; In re Snow, 120 U. S. 274.

Counts six and seven likewise split a single conspiracy.

I.

The respondent, under point 1 of its argument, at page 9 of its brief, contends that petitioners do not occupy an employee relationship with the employer. United States v. Hutcheson, 312 U. S. 219, effectually demonstrates the fallacy of the contention. Respondent overlooks the fact that the indictment shows on its face that petitioners were the bona fide representatives of Local No. 143, LATSE; that they not only negotiated for, but by virtue of the negotiations secured a wage contract fixing terms of employment, wages, hours and other working conditions which are legitimate objectives of a labor organization. The evidence shows that the members of Local No. 143 worked under this 1937 contract and collected wages thereunder. Therefore, it is clear that this case concerns wages and other

legitimate objectives of a labor organization as much, if not more, than does United States v. Local 807, 118 F. (2nd) 684. Furthermore, in the second transaction, counts 6 to 10 not only show that the corporation rendered the services contracted for, but did so at a price approximately one-third of that of its competitors. That a conflict exists between the case of United States v. Local 807, and this case is beyond cavil.

II.

Respondent's criticism under its point II is unsound, because the negotiating of a wage contract for moving picture machine operators in St. Louis has nothing to do with the interstate transportation of films. The Government's evidence showed that petitioners did not interfere with films; that the film exchange executives had no dealings whatever with the petitioners, and their operations were not interferred with (R. 112, 123, 127). Moreover, the petitioners contend that had film been interfered with in connection with a wage controversy concerning the moving picture machine operators, and had a strike resulted from such controversy, there still would have been no actionable interference with interstate commerce, because such would have been merely a remote and incidental restraint upon commerce which this Court has held, in both the Apex and Hutcheson decisions, is lawful conduct, for which a prosecution will not lie.

III.

Respondent assumes that Congress has the same powers with reference to curtailment of freedom of speech as the states enjoy, while, in fact and in law, Congress can make no law which abridges the freedom of speech, regardless of the nature of the abuse. That power was reserved by the states. A threat to strike is not and cannot constitute extortion.

IV.

Hearsay evidence is never admissible and it was peculiarly inadmissible in this case because of the exemption of labor unions under section 420 (d) of the act. Moreover, third party conversations held outside the presence of the petitioners were inadmissible, because they denied petitioners the right of confrontation of witnesses. The Court's charge cannot be supported under any theory so long as the labor policy of the United States is what the Norris-La Guardia and the Wagner Acts say it is.

V.

We respectfully submit that there is as much or more reason for the granting of a writ of certiorari in this case as there was in case No. 131, that is, United States v. Local 807. In our opinion, the reasoning at pages 10 and 11 of Government's petition, in cause No. 131, applies here.

The public importance of this question calls for an authoritative decision by this Court on the meaning of the language of the act. The interpretation of such language is raised and more fully presented by the instant case than in the case of United States v. Local 807, and the question of the meaning of this act and its application to the evidence in this case is so important that we analyze further in order that the Court may, at the very beginning, fully consider this point. The act reads as follows:

> "Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in the trade or commerce—
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or pro-

tective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate subsections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years, or by a fine of $10,000, or both."

Boiled down it means:

One who, **in connection with any act** affecting commerce,

(a) Obtains by force * * * money * * * not wages from employer to employee; or,

(b) Obtains property of another with his consent, induced by force or fear under color of official right; or,

(c) Commits or threatens physical violence or injury to person or property, furthering plan to violate sections (a) or (b); or,

(d) Conspires with others to commit any of the foregoing acts; shall be convicted, etc., etc.

The words, "in connection with or in relation to any act" certainly means an **actual act** (something done), not something **intended** to be done in the future, not something which **may or might be** done, not something **thought of.** While the law prohibits and punishes for criminal offenses **acts done** and **even some attempted,** never has the law

made one guilty for violation of law **thought of**, or even **intended.** There must be an **overt** act **committed.**

In the case at hand, to convict under paragraph (a) the Government must show that defendants "**obtained * * * by force * * * money, etc.,** IN CONNECTION **with an act affecting commerce**"; and that the defendants did not represent a bona fide labor organization and that they did not negotiate a wage contract for hours and wages for members of Local 143. That is to say, there must be a separate **act,** actually done, **affecting commerce,** other than and apart from the "**obtaining * * * by force * * * money, etc.**" The first paragraph of the law says, in effect (1), one who "**in connection with * * * an act affecting commerce,**" and paragraph two, lettered (a) says, "**obtains * * * money, etc. * * *.**"

The same analysis applies, of course, to each lettered section or paragraph of the law, that is, paragraphs (a), (b), (c) and (d).

It might here be pointed out to the Court that nowhere in all the evidence in this case can it be shown that any act on part of defendants, or anyone else, did in anywise **actually affect commerce.**

The following grammatical and syntactical interpretation of the act by Professor Frank Sullivan of St. Louis University was read to the Circuit Court of Appeals and is presented herein for the purpose of assisting the Court.

"Saint Louis University
Saint Louis, Missouri.

Department of English

May 14, 1941.

A grammatical and syntactical interpretation of:
Title 18, U. S. Code 420a. Interference with Trade

and Commerce by Violence, Threats, etc. Penalties. (June 18, 1934, c. 569.2. 48 Stat. 979.)

* * * * * * *

This piece consists of an introductory paragraph, which reads:

> "Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce * * *"

and of four other paragraphs, each of which is a predicate for the dependent clause, the subject of which is the word **who** in the introductory paragraph.

In its simplest terms, the law states that any person who does certain acts shall, upon conviction thereof, be guilty of a felony. These acts are enumerated in four paragraphs, lettered **a**, **b**, **c** and **d**, and are qualified by the introductory paragraph.

The subject of the law is **any person**. **Any person** is described by the adjectival clause, the subject of which is the word **who** in the introductory paragraph and the four-fold predicate of which is (as has been said above) the four paragraphs lettered **a**, **b**, **c** and **d**. But these predicates of the dependent clause are modified by an adverbial phrase in the introductory paragraph, which begins with the words **in connection with** and continues to the end of that paragraph.

In other words, the law states that the person to be guilty on this charge must do one of the acts specified in paragraphs **a**, **b**, **c** and/or **d**, and that this act so specified shall be performed **in connection with** an act affecting trade or commerce.

Frank Sullivan,
Asst. Prof. of English."

CONCLUSION.

It is, therefore, respectfully submitted that petitioners' application for writ of certiorari should be allowed as prayed.

Respectfully submitted,

SIGMUND M. BASS,
BRYAN PURTEET,
Attorneys for Petitioners.

Of Counsel:

WARREN E. MILLER,
Washington, D. C.

(6)

Office - Supreme Court, U. S.
FILED
DEC 13 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

JOHN P. NICK and
CLYDE A. WESTON,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 712.

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

SIGMUND M. BASS,
100 N. Broadway,
St. Louis, Missouri,
BRYAN PURTEET,
705 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioners.

Of Counsel:
WARREN E. MILLER,
Washington, D. C.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
1. Anti-Racketeering Act has never been construed by Supreme Court	1
2. Eighth Circuit Court's opinion in this case conflicts with that of Second Circuit in U. S. v. Local 807, 118 F. (2d) 684	1–2
3. There is grave doubt as to validity of Anti-Racketeering Act	4
4. Circuit Court's decision abrogates the expressed labor policy of United States	4
5. Congress has no power to abridge freedom of speech	4
6. Trial in which hearsay evidence admitted by Court was unfair	5
7. Third-party conversations admitted in evidence rendered trial unfair	5
8. The Court directed conviction, thereby denying petitioners trial by jury	5

Case Cited.

United States v. Local 807, 118 F. (2d) 684	2

Statutes Cited.

Anti-Racketeering Act, Sec. 420 (a), Title 18, United States Code	1, 4
Norris-La Guardia Act, Title 29, Secs. 101-105, United States Code	4
National Labor Relations Act, Title 29, Sec. 151, United States Code	4

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

JOHN P. NICK and
CLYDE A. WESTON,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 712.

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully petition and move the Court to grant them a rehearing in the above-entitled cause, in which their application for certiorari was denied by this Court on the 24th day of November, 1941, and in support of their petition and motion say:

1. The Honorable Court apparently inadvertently overlooked that Section 420 (a), Title 18, United States Code, has never been construed by this Court.

2. The Honorable Court apparently inadvertently overlooked that there is a direct conflict in the decision of the

Eighth Circuit Court of Appeals in this case and the Second Circuit Court of Appeals in the case of United States v. Local 807, in 118 F. (2nd) 684, in that the decision in petitioners' case denies the right of a bona fide labor organization **(not an outlaw labor union)**, through their representatives, to negotiate for wages, hours and conditions of employment **(the indictment admits that the petitioners did secure the 1937 wage scale contract and that the union worked under it and enjoyed its benefits, that is, the wages, hours and working conditions prescribed therein** [Par. 17, R. 19]), while the case of United States v. Local 807 holds (l. c. 686):

> **"For the foregoing reasons, we do not believe that the act made it a crime for labor unions to get jobs or an increase in wages for its members, even by threats of violence."**

The petitioners respectfully suggest that they should not be deprived of their liberty by the denial of a review of their case while there is any doubt in the mind of this Court or of the Department of Justice, and the petitioners further respectfully suggest that there must be some doubt by this Court, as well as the Department of Justice, because this Court granted certiorari on the application of the United States in United States v. Local 807. See case No. 131, Supreme Court of the United States, from which we quote the following:

> "Reasons for Granting the Writ.
>
> "1. The decision below is the first rendered by an appellate court construing the Anti-Racketeering Act; it presents an important question of statutory interpretation which has not been, but should be, settled by this Court.
>
> "The decision below, if allowed to stand, would deprive the Anti-Racketeering Act of a great deal of

its validity. That decision, in effect, provides labor racketeers with a ready formula for easy evasion of the Act; they need only require that the money they extort be paid in the form of wages, and assure that a proper proffer of services (whether desired or not) is made, and the prohibitions of the Act become inapplicable to them. A decision placing such a drastic restriction upon the practical operation of an important Act of Congress should, we submit, be reviewed by this Court.

"The initiation of additional prosecutions in other circuits in an attempt to secure a conflict of decisions would not be a satisfactory alternative to the grant of a writ of certiorari in this case. Such a course would mean that various defendants might from time to time be brought to trial and convicted under an interpretation of the statute which this Court might later hold to be erroneous. It would also mean, if the Government's position should ultimately be sustained by this Court, that the Act would have been rendered inoperative within the Second Circuit, as applied to this important class of cases, during the period required for the institution of additional prosecutions elsewhere and for securing review thereof by the appellate courts. In these circumstances, the desirability of a review of the present case by this Court seems evident.[14]

([14];—Footnote)—The grant of certiorari will bring in issue not only the meaning of the exemption of 'wages' paid by a 'bona fide' employer to a 'bona fide' employee, but also the meaning of the proviso in Section 6, which reads:

" 'That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.' "

3. The Honorable Court apparently overlooked that the Circuit Court of Appeals' decision in this case, if allowed to stand, denies the right of labor organizations or their representatives to threaten to strike in order to secure wages, hours and better working conditions, and is therefore contrary to the labor policy of the United States as outlined in both the Norris-La Guardia Act, Title 29, Sections 101-105, United States Code, and the National Labor Relations Act, Title 29, Section 151, United States Code.

4. This Honorable Court apparently overlooked the fact that a wage controversy in St. Louis, Missouri, between the moving picture theatre owners and the union of the moving picture operators, does not involve interstate commerce; that a threat by the operators to strike does not interfere with interstate commerce. **See testimony of film exchange executives to effect that petitioners did not interfere with transportation of films** (R. 112, 122, 127).

5. This Honorable Court apparently inadvertently overlooked that the communication of a wage demand by the operators to the theatre owners, accompanied either with or without a threat to strike, is an exercise of freedom of speech and that the Circuit Court of Appeals' decision holds that the Anti-racketeering Act forbids such an exercise of freedom of speech, if the communication can, under any circumstances, be interpreted as being partially to secure wages, hours and working conditions, and partially for the personal benefit of the labor leaders. The petitioners submit that the first amendment is unqualified and unlimited and absolutely forbids Congress to make any law of any kind abridging the freedom of speech. The opinion of the Circuit Court of Appeals should be reversed, because it confuses the power of Congress to regulate speech with the reserved powers of the people. The people have never delegated to Congress the right to abridge freedom of speech in any respect.

6. Petitioners respectfully suggest that the Supreme Court of the United States should not place its stamp of approval upon a trial where the essential fact, namely, the implied threat to strike, was made out by hearsay testimony which permitted the petitioners' accusers to delineate their (the accusers') states of minds. It must be remembered that the petitioners' accusers here were parties to the 1937 wage contract and that the petitioners were the other parties to the same contract. Therefore, to permit one party to a written contract to testify as to the negotiations is contrary to law. Furthermore, to permit such a party to testify to his state of mind in order to supply a link necessary to convict in a criminal trial, is absolutely unfair and, until this case was tried, unheard of. See argument under point III, page 23 et seq., petitioners' brief.

7. It was wholly unfair for the trial court to admit into the evidence third party conversations held outside the presence of the petitioners, or either of them (R. 262, 263, 364, 368-370, 384, 499, 498).

8. The Court's charge was highly prejudicial and in so many words told the jury to **"vote for a conviction"** (R. 839, 842). Therefore, the petitioners were denied a trial by jury, but, on the contrary, were tried and convicted by the Judge.

The petitioners respectfully and humbly petition the Court to reconsider its order denying their application for certiorari and pray that they be not condemned as felons unless and until the Supreme Court of the United States shall have reviewed this whole case and heard argument.

Petitioners respectfully suggest that they have presented at least seven substantial grounds for the granting of their application for certiorari, viz.:

1. Conflict of decisions.

2. Matter of wide public interest.

3. Conflict of statute with labor policy as expressed in other statutes.

4. Constitutional questions.

5. Lack of authoritative construction of Act by this Court.

6. Unfair trial below where Court made wide departure in applying rules of evidence.

7. Prejudicial charge by a trial court which practically denied petitioners a trial by jury.

CONCLUSION.

Wherefore, petitioners pray that the Court set aside its order denying petitioners' application for writ of certiorari; that this Court grant petitioners' application for certiorari and set the case for argument at an early date.

Respectfully submitted,

SIGMUND BASS,
BRYAN PURTEET,
Attorneys for Petitioners.

Of Counsel:

WARREN E. MILLER,
Washington, D. C.

Certificate.

Come now Sigmund Bass and Bryan Purteet, counsel for petitioners in the within cause and members of the bar of this court, and respectfully state to the Court that the petition for rehearing herein is filed not for delay, but in

good faith and believed by each and all of the undersigned counsel for petitioners herein to be meritorious, and that the foregoing motion has been written and filed in good faith and in the honest belief that this motion of petitioners for rehearing should be granted.

Sigmund Bass,
Bryan Purteet,
Attorneys for Petitioners.

December 11, 1941.

(7)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 712.

PETITION

For Leave to File a Second Petition for Rehearing of Application for Writ of Certiorari,

SECOND PETITION,

and

BRIEF IN SUPPORT THEREOF.

SIGMUND M. BASS,
100 North Broadway,
St. Louis, Missouri,
BRYAN PURTEET,
705 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioners.

Of Counsel:
WARREN E. MILLER,
Washington, D. C.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

Page

Petition for leave to file second petition for rehearing. 1
Second petition for rehearing..... 3
Brief in support of petition for leave to file second petition for rehearing 5

The Court's decision in U. S. v. Local 807 shows that Eighth Circuit Court decision in petitioners' case is erroneous..... 5
Comparison of decisions..... 7
No interstate commerce was shown in this case... 9
The law requires two separate and independent acts 10

Conclusion 13
Certificate 13

Cases Cited.

United States v. Local 807, 62 S. Ct. 642, 86 L. Ed. 574 .....3, 4, 5, 6, 7, 9, 10
United States v. Nick et al., 122 F. (2nd) 660..... 7

Statute Cited.

Anti-Racketeering Act, Section 420 (a), Title 18, United States Code 3, 4, 10, 11

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 712.

PETITION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully request leave to file a second petition for rehearing of application for writ of certiorari.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 712.

SECOND PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

1. Your petitioners respectfully petition and move the Court to reconsider the Court's order of December 22, 1941, wherein the Court denied petition for rehearing of application for writ of certiorari.

2. Petitioners say that the Court's denial of petitioners' application for certiorari and denial of petition for rehearing took place before this Court decided the case of United States v. Local 807, 62 S. Ct. 642, 86 L. Ed. 574, wherein the Court held:

a. That the anti-racketeering act was intended to eliminate terroristic activities by professional gangsters and

was not intended to interfere with traditional labor union activities;

b. That the anti-racketeering act excepts "any person who * * * obtains or attempts to obtain * * * the payment of wages from a bona fide employer to a bona fide employee";

c. That the intent of the employer to pay for labor or to pay for protection from violence is not controlling;

d. That the Congress intended to leave unaffected the ordinary activities of labor unions;

e. That labor disputes are not comprehended under the act and that violence or extortion growing out of labor disputes, while proper subjects for federal congressional control, are not covered by the anti-racketeering act.

3. Petitioners suggest to the Court that the record in their case shows that each had been, for more than thirty years past, members of a bona fide labor union; that the indictment (Tr. p. 19, paragraph 17) alleges that the petitioners were officers and representatives of a bona fide labor union and as such negotiated and were negotiating wage contracts at the time of the acts complained of in the indictment; that the proof most favorable to the government merely shows by way of hearsay an implied threat on the part of petitioners to call a strike unless petitioners' demands on behalf of the union for increased wages be met (R. 345). Petitioners say that the record (Tr. 277-287) shows that they secured the 1937 wage contract under which the union worked and collected wages.

Wherefore, petitioners suggest that the Court's decision in United States v. Local 807, in their opinion, indicates that they are being unlawfully confined in prison, and respectfully pray that this, their second petition for rehearing, be granted and that the writ of certiorari be granted, to the end that their conviction be carefully reviewed by this Honorable Court.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

JOHN P. NICK and CLYDE A. WESTON,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.
No. 712.

BRIEF IN SUPPORT OF PETITION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI.

This Court's Decision in United States v. Local 807 Shows That Eighth Circuit Court Decision in Nick v. U. S. Is Erroneous.

Petitioners respectfully invite the Court's attention to its decision in the case of United States v. Local 807, 62 S. Ct. 642, 86 L. Ed. 574, decided March 2, 1942, and respectfully suggest the similarity of the issues raised in petitioners' application for writ of certiorari.

The petitioners' indictment, conviction and imprisonment grew out of the negotiations for the 1937 wage contract (see executed contract, Tr. 277-287) between peti-

tioners, representing Local Union No. 143, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators, and a committee representing motion picture owners. It was alleged in the indictment (Tr. 14-24) (first five counts) that petitioners made high and unreasonable demands for wages, but relented and signed a contract for lower rates of wages than originally demanded, when paid off by the theatre owners.

The Government's theory was that a strike by the moving picture operators in St. Louis would interfere with interstate commerce because films are made in California and shipped throughout the states; that the petitioners impliedly threatened to call a strike of the moving picture machine operators unless their demands were met. There was no proof of an express threat to strike, and from an evidentiary standpoint the case turned on what the members of the committee said to each other after leaving the presence of the petitioners (Tr. 261-263; R. 345-347, 359). The Court will therefore readily observe that the petitioners were not only negotiating for the payment of wages for members of a labor union (in which respect this case is similar to United States v. Local 807 case), but also that the petitioners were representing a labor union, and, under the proviso in Section 6 of the Anti-Racketeering Act, were carrying out the legitimate objectives of a bona fide labor organization.

The long union record of petitioners (more than thirty years) brings them squarely under the protection of the Act as being exempt from prosecution. The record is devoid of scintilla of evidence showing either petitioner to be a criminal.

The Eighth Circuit Court of Appeals' decision in this case does not withstand the tests set forth in United States v. Local 807 by this Court.

Comparison of Decisions.

Nick v. United States, 122 F. 660, l. c. 671:	United States v. Local 807, 62 S. Ct. 642, l. c. 646, 86 L. Ed. 574:
"It is to show the state of mind of Kaimann produced by the transaction and that his conclusion was communicated to other members of the committee. Whether Kaimann was justified in reaching such conclusion is an entirely different matter. Whether justified or not, that was the conclusion which he stated and which, undoubtedly, had its effect upon the minds and the future actions of the members of the committee in making this payment."	"We take this to mean that the intent of the owners in making the payment is to be regarded as controlling. We cannot agree. The state of mind of the truck owners cannot be decisive of the guilt of these defendants.
L. c. 673-674:	
"The fourth item (assignment 30) is aimed at a statement by the Court to the effect that if appellants had in mind two purposes in extorting the money—one to enrich themselves and the other to gain proper wages for the members of the union — the fact that one purpose was unlawful under the Act would justify conviction. Much is made that	"But it is always an open question whether the employers' capitulation to the demands of the union is prompted by desire to obtain services or to avoid further injury or both. To make a fine or prison sentence for the union and its members contingent upon a finding by the jury that one motive or another demonstrated the employers' decision would

such a view is in the teeth of the prohibition in the Act (Section 420d), the argument being 'that no court of the United States shall construe or apply any of the provisions' of the Act 'in such manner as to impair, diminish or in any manner affect the rights of bona fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.' It seems to us an astonishing proposition that labor racketeers can coerce employers or anybody else to give them personal bribes in connection with wage negotiations and then escape punishment under this Act if any benefit in wages is obtained in those negotiations. Obviously, the only purpose or possible reason for employers bribing such racketeers in connection with wage negotiations is to secure lower wages than honest negotiations would probably produce. How such a situation could possibly result in anything but harm to the innocent members of the labor organization is not be a distortion of the legislative purpose."

L. c. 649:

"These instructions embody the rule for which the Government contends, and which we think is erroneous for the reasons we have given. Under them the jury was free to return a verdict of guilty if it found that the motive of the owners in making the payments was to prevent further damage and injury rather than to secure the services of the defendants. Whether or not the defendants were guilty of conspiracy thus became contingent upon the purposes of others and not upon their own aims and objectives. Moreover, the charge failed correctly to explain the legal consequences of proof that the owners had rejected bona fide offers by the defendants to perform the services. As we have said, the jury was bound to acquit the defendants if it found that their objective and purpose was to obtain by the use or threat of violence the chance to work for the money but to accept the

clear. It must be true that such innocent members are best served by representatives who honestly try to procure the best wages possible and who have no dividid, much less bribed, allegiance in such negotiations."

money even if the employers refused to permit them to work."

There is a direct and irreconcilable conflict in these decisions. We submit that the decision of this Court in United States v. Local 807 correctly states the intention of Congress to exempt labor, while the Eighth Circuit Court's decision in Nick v. United States overrides the intention of Congress by dicta which condemns the ethics of labor's representatives, but winks at the morals of unscrupulous employers who force labor to resort to threats and violence in order to gain labor's objectives.

The Court is urged to read the trial court's charge at Tr. p. 841, and note the method devised to by-pass the exemptions contained in the act. The example given there is wholly inapplicable and misleading because it eliminates from consideration the exemption as to wages and the proviso in section 6 exempting labor unions.

Counts 6 to 10, inclusive, of the indictment (R. pp. 40-43) are untenable under any theory. They simply allege that the petitioners forced the Theatre Owners to take sound service which the testimony shows was good service at cheaper rates than charged by their competitors (Tr. p. 552).

No Interstate Commerce Was Shown in This Case.

The petitioners' case should be reviewed by this Honorable Court, not only because its decision in United States v. Local 807 conclusively demonstrates that labor officials

may not be prosecuted under the anti-racketeering act when seeking wages or other legitimate objectives of a bona fide labor union, but also to determine whether petitioners' acts in any way interfered with interstate commerce. In other words, does an implied threat to call a strike of the men who operate the moving picture machines which run the films locally, interfere at all with interstate commerce? The interference with interstate commerce in the case of United States v. Local 807 was direct and immediate, because the over-the-road, interstate-bound trucks were stopped. Here no act of any kind was committed against anything which was moving in interstate commerce.

The Law Requires Two Separate and Independent Acts.

The grammar of the anti-racketeering act was not construed by this Court in United States v. Local 807, probably because it was not questioned. However, the real meaning of the phraseology should, in petitioners' opinion, be construed by this Court. The act reads as follows:

> "Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in the trade or commerce—
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or
>
> (c) Commits or threatens to commit an act of physical violence or physical injury to a person or

property in furtherance of a plan or purpose to violate subsections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years, or by a fine of $10,000 or both."

Boiled down it means.

One who, **in connection with any act** affecting commerce,

(a) Obtains by force * * * money * * * not wages from employer to employee; or,

(b) Obtains property of another with his consent, induced by force or fear under color of official right; or

(c) Commits or threatens physical violence or injury to person or property, furthering plan to violate sections (a) or (b); or

(d) Conspires with others to commit any of the foregoing acts; shall be convicted, etc., etc.

The words, "in connection with or in relation to any act" certainly mean an **actual act** (something done), not something **intended** to be done in the future, not something which **may or might be** done, not something **thought of.** While the law prohibits and punishes for criminal offenses **acts done** and **even some attempted,** never has the law made one guilty for violation of law **thought of,** or even **intended.** There must be an **overt** act **committed.**

In the case at hand, to convict under paragraph (a) the Government was under duty to show that defendants **"obtained * * * by force * * * money, etc.,** IN CONNECTION **with an act affecting commerce";** and that the defendants did not represent a bona fide labor organization and that they did not negotiate a wage contract for hours and wages for members of Local 143. That is to

say, there must be a separate **act**, actually done, **affecting commerce**, other than and apart from the **"obtaining * * * by force * * * money, etc."** The first paragraph of the law says, in effect (1), one who **"in connection with * * * an act affecting commerce,"** and paragraph two, lettered (a), says, **"obtains * * * money, etc. * * *."**

The same analysis applies, of course, to each lettered section or paragraph of the law, that is, paragraphs (a), (b), (c) and (d).

These words "any act" must refer to some act interfering with interstate commerce, and such act must be independent of and a necessary prerequisite of the acts of violence, coercion, etc., enumerated in sections a, b, c and d of the act.

There must first be an act affecting trade and commerce. This act must be followed by an act of, or threat to use, force, violence, coercion, etc. In short, it is the act described in line one which operates against trade and commerce. The use of the comma after the word "who," in the first line, has the effect of suspending or opening a gap in the sentence construction in order to permit the insertion of the clauses in a, b, c and d, but once these clauses are inserted, they are necessarily modified and restricted by the words "in connection with or in relation to any act," and the word "act" is likewise modified by the phrase "any way or in any degree." The Government adopted this construction of the act in drawing the indictment and in its argument against the demurrer to the indictment, but failing to prove any act of interference with interstate commerce, it abandoned the theory of the indictment and contended, in the argument of the demurrer to the evidence, that the alleged receiving of money was the gist of the statute, if a threat of any kind could be implied.

Nowhere in all the evidence in this case can it be shown that any act by defendants, or anyone else, did in any wise

actually affect commerce, or in any manner burdened commerce.

Petitioners respectfully inform the Court that they are now serving terms in penal institutions of the United States for convictions under the Anti-racketeering act, which has been partially interpreted by this Honorable Court since petitioners entered prison, in a manner which leads petitioners to believe that their imprisonment is contrary to law.

CONCLUSION.

Wherefore, petitioners pray that the Court grant the filing of petitioners' second petition for rehearing of the application for writ of certiorari and order writ of certiorari to issue.

Respectfully submitted,

SIGMUND BASS,
BRYAN PURTEET,
Attorneys for Petitioners.

Of Counsel:

WARREN E. MILLER,
Washington, D. C.

Certificate.

Comes now Bryan Purteet, counsel for petitioners in the within cause, and member of the bar of this court, and respectfully states to the Court that the second petition for rehearing herein is filed not for delay, but in good faith and believed by the undersigned counsel for petitioners herein to be meritorious, and that the foregoing motion has been written and filed in good faith and in the honest belief that this motion of petitioners for rehearing should be granted.

Bryan Purteet,
Attorney for Petitioners.

April 24, 1942.